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1007

REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

1883—1884.

VOLUME XV.

BY

GUY A. BROWN,

OFFICIAL REPORTER.

LINCOLN, NEB.:
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1884.

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By GUY A. BROWN, REPORTER OF THE SUPREME COURT.
In behalf of the people of Nebraska.

Rec. Nov. 23, 1884

THE SUPREME COURT

OF

NEBRASKA.

1884.

CHIEF JUSTICE,

AMASA COBB.

JUDGES,

SAMUEL MAXWELL.

M. B. REESE.

ATTORNEY GENERAL,

ISAAC POWERS, Jr.

CLERK AND REPORTER,

GUY A. BROWN.

DEPUTY,

HILAND H. WHEELER.

DISTRICT COURTS

OF

NEBRASKA.

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S. B. POUND,	SECOND DISTRICT.
JAMES NEVILLE,	THIRD DISTRICT.
E. WAKELEY,	THIRD DISTRICT.
A. M. POST,	FOURTH DISTRICT.
W. H. MORRIS,	FIFTH DISTRICT.
T. L. NORVAL,	SIXTH DISTRICT.
J. C. CRAWFORD,	SEVENTH DISTRICT.
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F. G. HAMER,	TENTH DISTRICT.

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S. M. NEVIUS,	EIGHTH DISTRICT.
E. CARKHUFF,	NINTH DISTRICT.
F. M. HALLOWELL,	TENTH DISTRICT.

The volume of laws quoted as the "Revised Statutes" refers to the edition prepared in 1866 by E. Estabrook.

The volume of laws quoted as the "General Statutes" refers to the edition prepared in 1873 by Guy A. Brown.

The volume of laws quoted as the "Compiled Statutes" refers to the edition prepared in 1881 by Guy A. Brown.

Acts of various years are cited by reference to volume of laws and the year in which they were passed.

This volume contains a report of all decisions handed down at the July term, 1883, and a portion of those handed down at the January term, 1884. The balance of opinions of this last term will appear in Vol. 16.

The syllabus in each case in this volume was prepared by the judge writing the opinion, in accordance with rule XIV. All of the judges concurred in the opinions except where specially noted.

Lincoln, Oct. 1, 1884.

RULES OF COURT.

The following new rule was adopted at the January term, 1884:

XIX.

In cases of the admission of attorneys to the Supreme Court, the clerk shall be entitled to charge and receive the following fees and no more: In case of original admission upon the report of a committee, seventy-five cents. Admission on motion, fifty cents. In addition to the above, in all cases where the attorney admitted may desire a certificate printed or engraved on parchment, the clerk may charge and receive an additional fee therefor of one dollar.

Rule VII. was amended to read as follows:

VII.

In all cases brought into the court upon error or appeal, the plaintiff in error or appellant shall, at least fifteen days prior to the week in which the case shall be entered for hearing, furnish to the opposite party or his attorney of record, a printed copy of his brief of points and authorities relied on; and within ten days thereafter the defendant in error or appellee shall furnish the plaintiff in error or appellant, as the case may be, a printed copy of his brief of points and authorities relied on; and each party shall, before the argument of the cause, file with the clerk of this court six copies of his brief aforesaid, one for each judge of the court and the others for the reporter, and the party bringing the case into this court shall hold the affirmative. And in original cases, unless for cause the court shall excuse the omission, briefs must be filed by the plaintiff and defendant in the same manner as in cases on error or appeal. The copies of briefs mentioned in this rule shall consist of ordinary printed matter in pamphlet form, and not in writing, cerograph, type writing, or any similar device.

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The following were omitted from the list published in Vol. 14:

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A. S. TIBBETS, Lincoln, Lancaster county.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JULY TERM, 1883.

PRESENT:
HON. GEORGE B. LAKE, CHIEF JUSTICE.
" AMASA COBB, } JUDGES.
" SAMUEL MAXWELL, }

GEORGE W. CLOTHIER, PLAINTIFF, V. MICHAEL MAHER
ET AL., DEFENDANTS.

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1. **School District:** CONSOLIDATION AND DEBTS OF. Where one of several school districts, consolidated under sec. 1, subdivision XIV. of the act "to establish a system of public instruction," approved March 1st, 1881, was indebted on bonds previously issued for school purposes, upon such consolidation being effected the new district not only became invested with all property rights of the former, but also became answerable for its debts; and a tax for their payment was properly levied on all taxable property within the new district.
2. **Statute:** CONSTRUCTION OF. In construing a remedial statute three things must be considered, viz.: The old law, the mischief, and the remedy. Broom & Hadley's Commentaries (Am. Ed.), 76.

ORIGINAL application for injunction.

Whitmoyer, Gerrard & Post, for plaintiff.

Charles A. Speice and John G. Higgins, for defendants.

LAKE, CH. J.

This action was brought against the county commissioners and treasurer to enjoin the collection of certain taxes levied by the commissioners of Platte county for the payment of school district bonds. These bonds were issued July 1st, 1873, by school district No. 1 of Platte county, which then, and until March 1st, 1881, was one of the two school districts into which the city of Columbus was divided. No. 13 was the other district.

By virtue of sec. 1, subdivision XIV. of the act of the legislature, entitled, "An act to establish a system of public instruction for the state of Nebraska," approved March 1st, 1881 [Comp. Stat., Chap. 79], these two districts were consolidated, and became and have since been a single one, under the name and style of "The school district of Columbus," etc. By operation of this statute the new district took the title to all school buildings and other property, real and personal, owned by the other two districts.

It is not questioned by counsel for the plaintiff, nor could it be successfully, that the legislature had the power to make this consolidation and invest the new district with the property of the other two. Nor does it seem to be doubted that, in such case, in the absence of some different direction by the legislature, consistent with the rights of creditors, the new district is legally and equitably liable for the debts of the other two; that, succeeding as to their property, they succeed to their liabilities also. Such is the rule. *Mount Pleasant v. Beckwith*, 100 U. S., 514. *Blanchard et al. v. Bissell*, 11 Ohio State, 96. *Thompson v. Abbott et al.*, 61 Mo., 176.

But the ground taken, and which seems to be relied on chiefly, is, that although the new organization has succeeded as to all the property rights of the old ones, in view of sev-

eral provisions of statute bearing on the subject, these bonds are still the debts of district No. 1, and collectible only out of the property of the territory embraced within its boundaries at the time they were issued. This position is based chiefly on sections 13 and 14 of the act of February 26th, 1879, providing "for the issuing and payment of school district bonds." Comp. Stat., Chap. 79, subd. XV. The first of these sections directs that the means for the payment of such bonds shall be raised by a levy and collection of taxes "upon all the taxable property" in the "school district by which they were issued." Sec. 14 enacts: "That the phrase and expression 'school district,' as used in the preceding section, is hereby declared to mean, intend, and refer to the school district as it existed immediately prior to and at the time of the issuance of any bonds by said school district, including all lands and property and inhabitants comprised and contained in said school district at the time of the issuance of any bonds, and including all and any portions of said district subsequently separated from said district, whether by the formation of a new district or by any change of boundaries of said original district."

It is contended on behalf of the plaintiff that there is no conflict whatever between this section and the provisions under which these two districts were consolidated, and, therefore that the levy, on account of these bonds, ought to have been made only, as it nominally directs, upon the property in that portion of the new district which composed district No. 1. In short, the contention is, that this section, given its exact literal import, must govern in this matter. With this view, however, we find ourselves unable to agree.

In the first place, we think there is an irreconcilable conflict between the two statutes, and that there being no right of the holders of the bonds respecting their payment involved, but only that of the tax payers of the new district, in their relation to each other, the more recent statute .

must be given what we deem to be its plain, obvious meaning, and the legislative intent, as gathered from a due consideration of all its parts.

Referring more particularly to the act of March 1st, 1881, we find that in addition to vesting the title to property of the old districts in the new, as we have seen, section 14 makes it the duty of the officers of the former to deliver "all property, funds, and papers intrusted to their care" to the officers of the latter, for its use and benefit. Sec. 22 imposes on the officers of the new district the duty, in positive terms, of providing "for the payment of debts created by" the superseded districts, "in the erection of school houses, or for other school purposes;" and where such indebtedness is in the form of bonds, "the holder or holders thereof" are given the privilege of exchanging them for bonds of the new district "of like amount of the same tenor and effect as to payment of principal and interest as the bonds surrendered." And sec. 28 provides: "That all moneys arising from any source whatever, which, under any prior act or acts of the legislature of this state, are payable to any school fund of any city of the state, or any moneys which are required to be set apart by the treasurer of any such city for the support and maintenance of any school heretofore organized therein, under any general or special law, shall, on and after the passage of this subdivision, be payable to the board of education, and shall be used only for the purposes specified in this subdivision." Comp. Stat., Chap. 79.

Giving due weight to these several provisions, and to the clause whereby the law under which the former districts existed as legal entities was wholly repealed, we are in no doubt that the intention of the legislature was to bestow upon the new district all of the property of the superseded ones, and to make it answerable for all their valid obligations. This being so, the levy for the payment of the bonds in question was properly made on the property of the entire district.

Having reached the conclusion that sec. 14, above cited, has no application to this case, it may not be worth our while to give what we consider is the full extent of its operation. We may be justified in saying, however, that in no case could it hardly be given a full literal application. It is essentially a remedial statute. In the construction of such statutes, three things are to be considered; "the old law, the mischief, and the remedy." 1 Broom & Hadley's Commentaries (Am. ed.), 76. This particular provision in the act of February 26, 1879, was intended, probably, to avoid an embarrassment, which about that time began to be experienced in providing means for the payment of school district obligations, growing out of the subdivision of districts, after they had become largely indebted, until they were so reduced in size, and consequently in taxable property, as to be left without the means for making payment. This court had occasion to consider such a state of facts in the case of *The People, ex rel. Owen, v. School District No. 9 of Hamilton County*, not reported, but referred to approvingly in *The State, ex rel. Mitchell, v. School District No. 9 of York County*, 8 Neb., 92, and the remedy applied, in the absence of statutory provision, was, to require a levy co-extensive with the limits of the district as they were when the debt was contracted. And that, doubtless, was equitable. At the next session of the legislature after that decision was made, the principle of it was recognized in the enactment of the section in question, as a part of the law relative to school district bonds.

It must be conceded that, where this section is applicable, a strict, literal construction would permit of no deviation whatever in the levy of a tax from the boundary of the district as it was when the bonds were issued. Indeed, to conform strictly, the levy would have to include not only all the land then within the district, but also all other property, and the "inhabitants comprised and contained" therein as well; so that, if any owner of taxable personal

Clother v. Maher.

property residing in the district when the bonds were issued, afterwards, and prior to the levy, removed therefrom to another district, or county, taking with him all his effects, they would still be within the contemplation of the letter of the statute, and the levy should include them. Not only this, but if a stranger should establish his abode in the district after the bonds were put forth, and become a tax payer as to every other branch of the revenue, he could not lawfully be included as one on their account. A construction leading to such absurd results ought not to be given, if it be possible to avoid it.

But, if such construction were the only one permissible, the enforcement of the section to this extent would be exceedingly doubtful. The true principle of taxation—the one enjoined by our constitution—is that of uniformity as to persons and property within the particular district for which the tax is imposed. “The legislature shall provide such revenue as may be needful by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises,” etc. Constitution, art. IX., sec. 1. “It is essential to all just taxation that it be levied with equality and uniformity.” *Brewer Brick Co. v. Inhabitants of Brewer*, 13 American Law Register (N. S.), 735. “A tax is properly a charge apportioned among the people of a tax district, so that each individual within its boundaries shall pay his proportionate share of the public burdens.” *Turner v. Althaus*, 6 Neb., 54. This rule of uniformity very clearly would require that all taxable property within the district when a levy is made, and only such, whether brought there before or after the bonds were issued, be taxed for their payment. And we have no idea that the legislature intended otherwise in the enactment of the section in question. Although not very happily expressed, the design we think was merely to hold subsequently detached territory for the payment of such bonds, but not to

Cowee v. Hooper.

exclude such as might be added to, nor property brought within the district afterwards.

The justice and propriety of this provision may well be doubted. Many reasons readily suggest themselves why in its operation it may be, and doubtless is, oppressive. To the writer hereof it seems a great and unwarrantable hardship to compel the people of territory taken from one district and given to another to contribute to the payment of the debts of both. That it would be much nearer the principles of justice and fair dealing, especially where no superior right of a creditor is involved, to make a proportionate part of the debt, under proper regulations, a charge upon the district to which the detached portion is given. This, however, is a matter within the province of the legislature. If there be a wrong in this particular, it is for that body to correct.

There is no equity in the plaintiff's case, and the action must be dismissed with costs.

JUDGMENT ACCORDINGLY.

THE other judges concur.

JAMES COWEE, PLAINTIFF IN ERROR, V. ED. HOOPER, DEFENDANT IN ERROR.

Practice in Supreme Court. There is no principle of law decided herein, as there was none involved in the case. Judgment below affirmed.

ERROR to the district court for Hall county. Tried below before GEORGE W. POST, J.

O. A. Abbott and G. H. Caldwell, for plaintiff in error.

T. O. C. Harrison, for defendant in error.

COBB, J.

The sole point made in this case by the plaintiff in error is, that the verdict of the jury is not sustained by the evidence, and it is urged, in effect, that this court should regard the verdict as the result of passion, prejudice, undue influence, or mistake on the part of the jury, and reverse the judgment and grant a new trial.

The action was brought on a promissory note executed by the plaintiff in error to one James I. Dillon, dated December 6, 1875, payable six months after date, and calling for forty-two dollars, with interest at ten per cent, and which note came into the hands of the plaintiff (defendant in error) after maturity. To the petition on the above note the defendant answered, alleging that the said note was made by him and delivered to said James I. Dillon as first payment on a certain tract of land owned by said Dillon, and by him sold to said defendant for a consideration, part of cash and part on time, secured by notes and mortgage. That after the delivery of such notes and mortgage by the defendant to the said Dillon the said purchase and sale of the said tract of land was mutually rescinded between the respective parties, the said mortgage was canceled, and that said Dillon agreed and promised to deliver up all of the notes given for the purchase money for said land, and especially the note mentioned in said plaintiff's petition, etc. The plaintiff replied to the said answer, denying that the note sued on was one of the notes given by the said defendant to the said Dillon as a part of the purchase price of the said tract of land, but alleging that the said note was given by the said defendant to the said Dillon for the purchase price of certain household and other personal property purchased by said defendant from said Dillon, etc.

Schell v. HuseNSTINE.

The principal testimony on the part of the plaintiff consists of the deposition of James I. Dillon, and on the part of the defendant of his own testimony, and either of them taken alone is, I think, sufficient to establish his respective theory of the case. But their statements are conflicting with each other, and both cannot be true. It cannot be said that there is a clear want of testimony to sustain the verdict, nor could it have been said had the verdict been the other way. There is one point, however, which no doubt had great weight with the jury. All agree that the real estate notes were to draw interest at but six per cent, while the note in suit provides for interest at ten per cent. This, I think, added to the positive statements of the witness Dillon, was sufficient to turn the scale in favor of the plaintiff in the court below, without the intervention of passion, prejudice, undue influence, or mistake.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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35	908

B. W. SCHELL ET AL., PLAINTIFFS IN ERROR, V. JOSEPH
HUSENSTINE, DEFENDANT IN ERROR.

1. **Trial of Right of Property:** PRACTICE. When an order of attachment is issued by a county judge, in a case in which the county court has jurisdiction concurrently with the district court, and chattels, seized upon such attachment, are claimed by a person other than the defendant in such attachment suit, proceedings for the trial of the right of such property should be commenced and conducted under the provisions of sections 486 and 487 of the civil code.
2. **Records:** PRESUMPTION. When a record, brought to this court on error, speaks of an order of attachment issued by a county judge, but fails to state in what amount it was issued, or to oth-

erwise describe it, it will be presumed to have been issued in a case in which the county court had jurisdiction concurrently with the district court.

ERROR to the district court for Gage county. Tried below before WEAVER, J.

Sabin & Cobby, for plaintiff in error, cited: *Noakes v. Switzer*, 12 Neb., 160. *Jones v. Carr & Co.*, 16 Ohio State, 420. *Maxwell's Justice*, 104.

R. S. Bibb and *A. J. Hale*, for defendant in error, cited: *Armstrong v. Harvey*, 11 Ohio State, 531. *State v. Powell*, 10 Neb., 50.

COBB, J.

There is but one question presented by the record, or argued in the briefs, in this case. That is, whether, in contemplation of the provisions of the statute providing for what is popularly known as the trial of the right of property, the county judge is a judge of a court of record, or a justice of the peace. The statute provides somewhat different proceedings for the trial of the right of property in cases where personal property, taken on execution or attachment issued out of a court of record, is claimed by a person other than the defendant, and cases where the writ is issued by a justice of the peace and the property levied upon is so claimed. In the latter case the trial may be had before a justice of the peace, without a jury, unless a jury is demanded, as in other cases; while in the former it is made the duty of the justice to issue a writ of summons directing the sheriff or constable to summon five disinterested men having the qualifications of electors, etc. And the matter shall be tried before such jury, etc. The mode of procedure in the two cases differs in some other respects, but the above is regarded as the most important one.

In the case at bar an order of attachment was issued at the suit of the plaintiffs in error by the county judge of Gage county against one Thomas Ratz. The sheriff having levied the said order on certain chattels as the property of said Ratz, the defendant in error herein claimed the same, and instituted this proceeding for the trial of the right thereof. The record is silent as to the amount of the plaintiffs' claim sued for in the action in which the order of attachment was issued. Were such amount stated it might relieve the case of considerable difficulty. The act approved March 8, 1873 (before the present constitution), provides as follows: "Sec. 2. Probate judges in their respective counties shall have and exercise the ordinary powers and jurisdiction of justices of the peace, and shall have concurrent jurisdiction with the district court in all civil cases in any sum not exceeding five hundred dollars, exclusive of costs. * * * And the provisions of the code of civil procedure relative to justices of the peace, shall, where no special provision is made by this subdivision, apply to the proceedings in all civil actions prosecuted before said probate judges." Comp. Stat., Chap. 20. Section 1 of the act declares that such court shall be a court of record. The constitution since adopted provides, art. VI., §§ 15 and 16, for the election of county judges and the organization of county courts, and provides that such courts shall be courts of record, and limits their jurisdiction in civil cases to actions wherein the sum claimed shall not exceed one thousand dollars. Sec. 15 of art. XVI. provides that such county courts shall be the successors of the probate courts.

It is not deemed necessary in this case to enter into a discussion of the proposition that a county judge, when acting within the jurisdiction which he possesses in common with the justices of the peace of his county, should be regarded as a justice of the peace to all intents and purposes. The constitution declares this court to be a court of record. No one will claim that it is anything else while acting within

that jurisdiction which it possesses concurrently within the district court. And there being nothing in the record showing the character of the action in which the order of attachment was issued, it will be presumed to have been issued by the county judge while in the exercise of his general or enlarged jurisdiction. In other words, a county judge does not act as a justice of the peace *prima facie*, whatever construction we may be constrained to place upon certain of his official acts by the anomalous provisions of the statute. It may be claimed that the presumptions are in favor of the correctness of the judgment of the district court in affirming the judgment of the justice. But such presumption, if it exists, must be very weak where all of the evidence which was before that court is now before this to show for itself.

It is true that this court, in *The State v. Powell*, 10 Neb., 50, following *B'Hymer v. Sargent*, 11 Ohio State, 682, said: "The proceeding for a trial of the right of property under the statute is a summary one, to be tried by the justice, and is not in any just or legal sense a 'civil action,' and therefore 'not properly triable by a jury.'" But in the case of *The State v. Powell* and the Ohio case, the executions had been issued by justices of the peace, and could not possibly come within the provisions of sec. 486 of the code. There can be no doubt that under the provisions of this and the following sections the question could be tried in no other manner than to the jury of five men therein provided. And as, in my view, the case at bar properly comes under these provisions, and as the trial was had to the justice without a jury, the conclusion is irresistible that the district court erred in affirming the judgment, and said judgment must be reversed.

REVERSED AND REMANDED.

THE other judges concur.

JAMES P. MILLER ET AL., PLAINTIFFS IN ERROR, V.
WILLIAM H. WILLIS, DEFENDANT IN ERROR.

1. **Parties.** A slight variance in the name of one of the parties in the judgment from that in the execution will not vitiate it, where it is apparent from the pleadings and proceedings that the parties are the same.
2. ———: **ACTION.** The objection that the plaintiff has not legal capacity to sue must be made, if at all, by the defendant before judgment. The objection is not available to a stranger.

ERROR to the district court for York county. Tried below before GEORGE W. POST, J.

Lamb, Billingsley & Lambertson, for plaintiff in error, cited: *Angell & Ames on Corporations*, sec. 650. *Freeman Judg.*, sec. 154. *Bank v. Smalley*, 2 Cow., 778. *Corbin v. Pearce*, 81 Ill., 461. *Jackson v. Walker*, 4 Wend., 463. *Freeman Ex.*, 43.

W. T. Scott and *W. P. Conner*, for defendant in error.

MAXWELL, J.

In 1878 the Kansas Wagon Manufacturing company recovered a judgment in the county court against Benjamin H. Willis and Thos. C. Tagg, for the sum of \$76.65 and costs. In January, 1880, an execution was issued on this judgment, and levied on certain hogs as the property of Benjamin H. Willis. Thereupon William H. Willis, a son of Benjamin, claimed the hogs as his and took them from the plaintiffs in error, Miller being sheriff and Laycock his deputy, on a writ of replevin. On the trial of the cause a verdict was returned in favor of Willis, upon which judgment was rendered. The county judge of York county was called as a witness, and after testifying that he was county judge and had possession of the records

of that court, produced the record of a judgment in favor of the Kansas Manufacturing Co. v. Willis and others, upon which judgment the execution was issued. This was offered in evidence, and objected to by the defendants in error "on the ground that the execution in this case is not the same case at all as that on the record offered in evidence; that nothing appears in the record to show that the Kansas Manufacturing Co. is a corporation, or personally competent to bring suit within this state." The objections were sustained and the record excluded. In this there was error. The record clearly shows the recovery of the judgment, and that the execution under which the plaintiffs had levied upon the property in dispute was issued upon that judgment.

The omission of the word "wagon" from the name of the company or corporation did not render the execution void, nor the record of the judgment, when properly identified, as it was in this case, inadmissible. The sheriff and the deputy were holding the property under an execution valid upon its face, and issued by the county judge upon a valid judgment in the county court. This being so, there was no such variance as rendered the judgment inadmissible. Where it is apparent from all the pleadings and proceedings in a case that the parties are the same, a slight variance in the name of one of the parties in the execution will not vitiate it. *Holmes v. McIndoe*, 20 Wis., 657. *Hays v. Bernard*, 38 Ill., 297. *Thornton v. Lane*, 11 Ga., 459. *Lewis v. Avery*, 8 Vt., 289. The record of the judgment should have been admitted.

Second. The objection that the plaintiff has not legal capacity to sue must be made, if at all, by a party to the suit. It is an objection that must be specially made, or it will be waived. If no objection on that ground is made, and judgment by default is rendered, in cases where personal service is had, at least, there is an implied admission of the legal capacity of the plaintiff to bring the action, and

Wilson v. Shepherd.

the defendant cannot raise it after judgment is rendered. A stranger cannot raise the objection. The second objection, therefore, was not well taken. The court also excluded testimony which we think should have been admitted, but as it was excluded evidently upon the theory that the execution was invalid, it is unnecessary to refer to it. The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THE other judges concur.

CHARLES H. WILSON, PLAINTIFF IN ERROR, v. WILLIAM
A. SHEPHERD, DEFENDANT IN ERROR.

1. **Final Order.** An order overruling a motion to discharge an attachment is not a final order, as it is subject to review up to the time judgment is rendered.
2. **Attachment.** A defendant may give the undertaking required by section 206 of the code, for the delivery of the attached property, and afterwards move to discharge the attachment.

ERROR to the district court for Antelope county. Tried below before TIFFANY, J.

The petition filed in the cause there is as follows:

1. The plaintiff complains of the defendant for that on or about the first day of December, A.D. 1880, plaintiff and defendant entered into a copartnership for the purpose of engaging in buying and selling the plows and wagons manufactured by the Pekin Plow Co., T. H. Smith & Co., and the Aultman & Taylor Thresher, said business to be carried on under the firm name and style of Shepherd & Wilson, and said partnership to continue for the period of one

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year, or during the year 1881, and to be conducted at the village of Oakdale, in said county; and the said parties to share equally the profits of said business.

2. That according to the terms of said copartnership the said defendant was to have charge of the buying of the goods manufactured by said firms, and to purchase no goods except from said firms.

3. That contrary to the terms of said copartnership the said defendant, without the knowledge or consent of the plaintiff, ordered from divers and sundry firms and manufacturing companies different goods, machinery, and implements, and gave in settlement of such purchases certain promissory notes, signing said firm name thereto, of which facts plaintiff had no knowledge at the time said notes were executed, nor in some cases till the maturity of such notes.

4. That about the first day of January, A.D. 1882, plaintiff learning of the indebtedness so contracted in said firm name, suggested to the defendant a dissolution of said copartnership, which was agreed to by defendant, with the contract and agreement by and between said parties that defendant should take all notes belonging to said firm, as well as all goods and effects of every nature and description of said firm, and assume and pay out of the proceeds of the collection of said notes and the sale of said goods all indebtedness of said firm.

5. That in compliance with the terms of said contract plaintiff surrendered to defendant all property and effects of said firm, and defendant has disposed of all such property except the sum of about \$425, and fraudulently converted said property and effects to his own use with intent to defraud this plaintiff, and utterly failed to pay or provide for the payment of the indebtedness of said firm; that defendant is now insolvent, and payment cannot be enforced against him.

6. That the total amount of the indebtedness of said firm equals now the sum of \$1,222.11, in excess of all as-

Wilson v. Shepherd.

sets or effects of said firm accounted for by defendant, which amount plaintiff is now required to pay or allow judgment to be taken against him for said amount, and accordingly plaintiff has secured a portion of said indebtedness from his own private property, to-wit: the sum of \$560. The plaintiff therefore asks judgment against defendant for said sum of \$1,222.11 and costs of suit.

S. D. Thornton and W. M. Robertson, for plaintiff in error.

D. A. Holmes, for defendant in error.

MAXWELL, J.

The defendant in error commenced an action against the plaintiff, in the district court of Antelope county, to recover the sum of \$1,222.11, and caused an order of attachment to be issued and levied upon certain property of the plaintiff in error, who afterwards filed a motion to discharge the attachment, which was overruled. The case is not yet determined in the district court, and the sole question for consideration is the order overruling the motion to discharge the attachment.

The code provides that in case of an order discharging an attachment, and any party affected thereby shall except thereto, the court or judge shall fix the number of days, not exceeding twenty, in which such party may file his petition in error, during which time the attached property shall be held by the sheriff, the plaintiff in error to give an undertaking in double the appraised value of the property, conditioned to pay the adverse party all damages which he may sustain in case the order discharging the attachment shall be affirmed. Civil Code, § 236e, Comp. Stat., 561.

An order discharging an attachment is a final order, because the attached property is released and the plaintiff may thereby be deprived of a substantial right. *Turpin v.*

Coates, 12 Neb., 321, as a dissolution discharges the lien of the attachment. *Watson v. Sullivan*, 5 Ohio State, 43. But where the court overrules the motion—in effect holds that the showing made by the defendant is not sufficient to entitle him to a dissolution, the order is not final. It is still subject to review by the court up to the time of rendering final judgment.

The owner of the attached property may have the same released at any time by giving the undertaking required by section 206 of the code, and the giving of such undertaking will not preclude him from afterwards moving to discharge the attachment. *Hilton v. Ross*, 9 Neb., 406. Some objection is made to the form of the action as being upon a guaranty, but we are of the opinion that an attachment will lie upon the facts stated in the petition.

There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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N. ALBERT SHERMAN, APPELLANT, v. EDWARD BATES,
APPELLEE.

Building Contract. Where a contractor agrees to erect a building in a certain manner he must comply with his agreement; and no plea of lack of skill of himself or any of his workmen or sub-contractors will constitute a defense for a failure to comply with the contract.

APPEAL from the district court of York county. Tried below before GEORGE W. POST, J.

Sedgwick & Power, for appellant.

Scott & Frank, for appellee.

MAXWELL, J.

This is an action by the plaintiff against the defendant to recover the sum of \$492.60 as a balance due upon a contract for the erection of a two-story brick building in the city of York. The defendant, in his answer, admits the contract and the erection of the building, but states that the plaintiff did not construct said building according to said contract, etc. Then follows a statement of the defects in the material and workmanship, the defendant claiming damages in the sum of \$1,985. The contract price was the sum of \$2,535 and the excess over \$200 on the counter, which seems to have cost \$238.90. The plaintiff has been paid the sum of \$2,090. There is also a slight charge for changes in the building. The cause was tried in the court below without a jury, and the issues were found in favor of the defendant and the action dismissed. The plaintiff appeals.

It is contended by the plaintiff's attorney that the finding and judgment are unsupported by the evidence, and therefore should be set aside. This is the principal ground upon which a reversal is sought.

It is admitted by the plaintiff and all the proof shows that the building is imperfect, but as an excuse for the defects of construction it is said in the brief of the attorneys for the plaintiff that the plaintiff "had no experience in laying foundations; this was known by the defendant, and it was not contemplated by the parties that the plaintiff should perform the work himself; but it was understood that he would rely upon others to do the work of laying the foundation. Of the qualifications of the party employed to do this work, and of the character of the work and the manner in which it was being done, defendant had the same opportunities of judging that plaintiff had. The

defendant was present during the whole time that the foundation was being laid." A party entering into a contract to construct a building thereby agrees that all parts of the building shall be constructed according to agreement. As a defense to inferior workmanship he cannot say, "I am not a mason or carpenter or tinsmith, therefore I am not liable for defects caused by unskillful or careless workmen."

The question is not one of skill on the part of the contractor, but of compliance with the contract. If the contractor agrees to erect a building in a certain manner he must comply with his agreement, and no plea of a lack of skill of himself or any of his workmen or sub-contractors will constitute a defense for a failure to comply with the contract. No waiver on the part of the defendant is shown, and in our opinion the judgment is fully sustained by the testimony, and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

CLEVELAND PAPER COMPANY, PLAINTIFF IN ERROR, v.
CHARLES BANKS, DEFENDANT IN ERROR.

- 1. Trial: ARGUMENT OF COUNSEL TO JURY.** On the trial of a cause against one B., the president of a printing company, on an alleged agreement of said B. to pay for certain paper furnished the printing company, the attorney for B. persisted in offering to prove that one S., the secretary of the printing company, had embezzled the funds and appropriated the property of the said company, which evidence was excluded. In the argument to the jury, B.'s attorney said, "The history of Smith you know; they told you that directly after these goods were shipped, Smith went away, and that he went away with prop-

15	20
16	514
17	153
17	283
17	435
20	173
15	20
26	593
15	20
32	892
15	20
36	708
15	20
44	873
15	20
45	340
15	20
46	312
15	20
54	133
55	753
15	20
56	299
56	815

erty that was not his own," *Held*, Error, and that the cause would be reversed.

2. ———: MOTION FOR NEW TRIAL. ASSIGNMENTS OF ERROR. Under the general assignment, in the motion for a new trial, of "errors of law occurring at the trial," only such errors as appear in the bill of exceptions can be considered. If objection is made to any of the instructions it must be specifically assigned.

ERROR to the district court for Douglas county. Tried below before NEVILLE, J.

Congdon, Clarkson & Hunt, for plaintiff in error, cited *Cropsey v. Averill*, 8 Neb., 160.

Bartlett & Peckham, for defendant in error.

MAXWELL, J.

This is an action by the plaintiff against the defendant to recover the sum of \$213.48 and interest, for paper alleged to have been sold by the plaintiff to the defendant. The answer is a general denial. On the trial of the cause the jury returned a verdict in favor of the defendant, upon which judgment was rendered.

The errors assigned are: 1st. Misconduct of the prevailing party. 2d. That the verdict is not sustained by the evidence. 3d. Errors of law occurring at the trial.

The testimony shows that in October, 1879, one Smith, the secretary of the Omaha Post Printing Company, applied to one Taylor, the salesman of the plaintiff at Chicago, to purchase the paper in question. Taylor refused to sell the paper unless Banks, who was the president of the printing company, and Liedtke, the vice-president, would agree to pay the bill. On the 6th of October of that year Smith wrote to Taylor saying that "Mr. Banks is willing to accept the bills individually, but he declines to ask either Capt. Liedtke or any one else to go security for such bills for such amounts as a couple of hundred dollars."

On the 30th of October, 1879, Smith wrote to Taylor acknowledging the receipt of the paper, and saying it "is perfectly satisfactory as to quality. If you have not already drawn on us, we will remit you about the 20th of November one-half the amount of your bill, and the other half about the 20th of December."

There is also a letter from the defendant to the plaintiff, dated April 16, 1880, wherein he says: "I will pay the old account, and then you must give sixty days on the new order," etc. There is a large amount of other testimony to which it is unnecessary to refer. During the trial of the cause an attempt was made by the defendant's attorney to show that Smith, the secretary of the company, had embezzled funds belonging to the company. This was ruled out as improper. It was also stated that the theory of the defendant's case was that Smith had received this paper and applied it to his own use; but there was no testimony to that effect. In the argument of the cause to the jury, however, Mr. Peckham, the defendant's attorney, used the following language: "The history of Smith you know; they told you that directly after these goods were shipped Smith went away, and that he went away with property that was not his own." The plaintiff's attorneys objected to the use of this language, and the court restrained the attorney from making such statements.

The rights of parties are to be determined from the evidence, and an attorney in arguing a case to a jury must confine the discussion of facts to those proved. If he can be permitted to make assertions of facts, or insinuations of the existence of facts, not supported by the proof, there is danger that the jury will lose sight of the issue or be influenced by misstatements to the prejudice of the other party. Where such statements are improperly made *prima facie* they are prejudicial, and may be sufficient to cause the reversal of the case. In the case under consideration it was entirely immaterial whether Smith had embezzled the

funds or appropriated the property of the Post Printing Company or not, and any evidence tending to prove such facts or assertions of their existence must have directed the attention of the jury from the real question at issue, and must have been prejudicial. That evidently was the object of the statement, and that it had the effect desired is pretty clear. The question at issue was whether Banks, the president of the company, had made himself personally responsible for the payment of a quantity of paper purchased for and received by the Post Printing Company. Whether or not Smith had embezzled the funds or appropriated the property of the company in no event could have the slightest relation to the case, and the only effect of the persistent offer of such evidence and making of such statements was to cause the jury to consider that the alleged wrong of Smith would defeat the liability of the defendant. In our opinion, therefore, the statement was so far prejudicial as to demand a new trial. The verdict is also against the clear weight of evidence. A clear preponderance of the evidence tends to show that the defendant did agree to pay for the paper, notwithstanding his deliberate denial of the same.

Objections are made to certain instructions, but as they do not seem to have been made in the motion for a new trial they cannot be considered. While under the statute all errors occurring during a trial may be considered under the general assignment of "errors of law occurring at the trial" [Comp. Stat., 573], this evidently refers to the errors shown by the bill of exceptions. But as instructions are required to be in writing and to be filed with the clerk before being given by the court, and must be marked "Given or refused and exceptions noted," and thus become a part of the record, they are not required to be, nor should be, made a part of the bill of exceptions.

If exceptions to the instructions are relied upon they must be assigned in the motion for a new trial. And this

is but just to the trial court. It is pretty evident too, that the legislature never intended under a general assignment to include errors which appear in the record aside from the bill of exceptions. These errors, therefore, cannot be considered.

The judgment of the district court must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

15	24
18	495
20	306
30	300
15	24
25	287
15	24
40	666
15	24
49	297
15	24
58	267
15	24
60	27
60	554

A. M. COOL, PLAINTIFF IN ERROR, V. ROCHE, HALL & RAY, DEFENDANTS IN ERROR.

1. **Notice to Take Depositions.** A notice served on the 24th to take depositions on the 28th of a month, a Sunday intervening, at a place requiring two days' travel to reach by the usual route, gives one day less than the statute requires.
2. ———. The notice shall be served so as to allow the adverse party sufficient time by the usual route of travel to attend, and one day for preparation, exclusive of Sundays and the day of service. Code, § 378.
3. **Evidence: CROSS-EXAMINATION OF WITNESS.** The cross-examination of a witness must be restricted to facts and circumstances connected with the matters called out by the direct examination.
4. **Replevin: PLEADING: GENERAL ISSUE.** In an action of replevin under the general issue the rights of the respective parties may be shown and determined.

ERROR to the district court for Antelope county. Tried below before BARNES, J.

Sedgwick & Power, for plaintiff in error.

Thomas O'Day and W. M. Robertson, for defendants in error.

LAKE, CH. J.

This is a petition in error from Antelope county. One of the errors complained of is the suppression of a deposition for want of sufficient notice of the taking. The notice was served on the 24th of February, 1881, at Neligh, in said county, that the deposition would be taken in York on the 28th. The 27th of February was Sunday, and it is agreed that, by the usual route of travel, two days were required to reach York from Neligh.

The statute provides that "the notice shall be served so as to allow the adverse party sufficient time by the usual route of travel to attend, and one day for preparation, exclusive of Sundays and the day of service." Code of Civil Procedure, § 378. Under this rule the notice in question is clearly defective; for, after excluding the day of service, Sunday, and the two days required to reach York, no time whatever is left for preparation. The deposition was rightly suppressed.

The action below was replevin. It was brought by the defendants in error to obtain possession of some horses which had been mortgaged to them by one J. B. Meehan, Oct. 12th, 1880. The plaintiff in error, who was defendant below, answered the petition, which was in the usual form in such cases—first, *non detinet*, and second, a general denial. The defendants in error introduced in evidence, on the trial, the mortgage under which they claimed the horses, and showed by oral evidence that, prior to the commencement of this action, they had, as mortgagees, caused them to be taken in possession by P. D. Thompson, a constable, from whom they were taken by the plaintiff in error under a writ of replevin issued against him by a justice of the peace, at the suit of Will E. Sharp, who, it

Cool v. Roche, Hall & Ray.

appears, claimed them by virtue of two chattel mortgages of which he was assignee, executed, one by said J. B. Meehan, June 3d, 1880, and the other by his wife, Samantha Meehan, April 15th, 1880.

As part of their case in chief, the defendants in error called the plaintiff as a witness and asked him whether, at the commencement of the action, he had possession of the horses, to which he gave an affirmative answer. Upon this his counsel sought to bring out, by means of cross-examination, the right by which he held them. This the court held could not be done, and the ruling is now assigned as prejudicial error.

The rule here applicable is, that the cross-examination of a witness must be restricted to facts and circumstances connected with the matters called out by the direct examination. 1 Greenleaf on Ev., § 445. *Davis v. Neligh*, 7 Neb., 84. *Clough v. The State*, Id., 320. The fact of the horses being in his possession at that time, alleged in the petition, was put in issue by the answer. It was this fact, simply, which was brought out by the direct examination. The right by which he held it was a different thing altogether, and was not inquired of.

To entitle them to recover against the plaintiff in error, it was necessary for the defendants, under the issue joined, to show that he had possession of the horses when the action was brought. But it was not necessary for them to inaugurate an inquiry as to his right of possession as against their mortgage, nor did they do so by their direct examination of this witness. On this question the ruling was correct.

As a defense to the action, there were offered in evidence the proceedings in the replevin suit of Will E. Sharp against P. D. Thompson, and copies of the two chattel mortgages of which Sharp was assignee, which, together with other evidence in the case, had they been admitted, would have shown conclusively that at the commencement

of this action the horses were already in the custody of the law, and held by the plaintiff in error, as sheriff, under a valid order of delivery, based on a lien superior to that of the defendants in error.

The real objection to the reception of this evidence, as we gather from the brief of counsel, seems to be that the interest of Sharp, in whose behalf the sheriff held the property, could not properly be shown under the answer. This, however, is a mistaken view of our replevin law. The gist of this action—without which it is not maintainable—is an unlawful detention of property. *Haggard v. Wallen*, 6 Neb., 271. *Non detinet*, or a general denial, puts this in issue, and under such issue the rights of the respective parties may be shown and finally determined. Such is the established rule in this state. *School District v. Shoemaker*, 5 Neb., 36. *Hedman v. Anderson*, 8 Id., 180. *Richardson v. Steele*, 9 Id., 486. In the exclusion of these items of evidence there was error, for which a new trial must be awarded.

The court below also erred in striking out the testimony of the witness Snyder as to the value of some of the horses. He had testified, without objection as to his competency to give an opinion on this subject, that the pair of mares, "Mollie" and "Kittie," had been kept for awhile at his stable, that he knew them, and that he thought they would have sold "for about \$175;" that they were in fact "sold for that much." Thereupon, a motion to strike this testimony out, "as being incompetent, irrelevant, and immaterial," was sustained. Neither of these objections was tenable. The evidence was competent, relevant, and material, and should have been retained. For these reasons the judgment must be reversed and the cause remanded to the court below for a new trial.

REVERSED AND REMANDED.

THE other judges concur.

16-820

15 28
d58 740ELIZABETH J. DAVIS ET AL., PLAINTIFFS IN ERROR, V.
JAMES A. HUSTON ET AL., DEFENDANTS IN ERROR.

1. **Foreclosure of Mortgage:** INFANT: NOTICE BY PUBLICATION. An infant of whatever age, residing with its mother, who is a widow and a resident of another state, will not be presumed to have a guardian residing in this state, and in a suit against such infant for the purpose of foreclosing a mortgage on real estate situated in this state, it will be sufficient to state in the affidavit for service of notice by publication: "That said * * * are non-residents of the state of Nebraska, and that service of a summons cannot be made upon them in this state."
2. **Service by Publication.** The provisions of the statute requiring the publication of notice to non-resident defendants to be made four consecutive weeks in some newspaper, etc., *Held*, To mean the same as though the language were that it should be printed or inserted in a weekly newspaper once in each week for four weeks successively, and that the publication is deemed complete upon the distribution of the newspaper containing its fourth successive weekly insertion. The paper will be presumed to have been published on the day of which it bears date.
3. **Acknowledgment of Deed.** The objection to a deed, that the acknowledgment was taken before a county clerk, is cured by the second section of the act approved Feb. 24, 1883. Laws 1883, 181.

THIS was an action of ejectment brought in the district court of Richardson county. The plaintiffs in error, who were plaintiffs below, claimed the land in controversy, as the widow and heirs at law of one Thomas Hodkins, deceased. It was admitted upon the trial that the patent for the land was issued and delivered by the United States to the said Thomas Hodkins, and that he thereby became the owner in fee simple. It was further admitted that the plaintiffs were the widow and sole heirs at law of the said Thomas Hodkins. The defendant Scammon claimed the title and right to the possession of the said land as the grantee in a deed of conveyance made by the sheriff of said county of Richardson, under a decree of foreclosure in an

Davis v. Huston.

action wherein one Henry Gardner was plaintiff, and all of the plaintiffs herein were defendants. It appeared from the record that Thomas Hodkins, while he owned and occupied the land, executed and delivered to Henry Gardner a mortgage thereon to secure the payment of a certain promissory note. The said Hodkins having died, and the note being unpaid, Gardner brought suit in the district court of said county of Richardson to foreclose the mortgage, in which action the widow and heirs at law of Hodkins (plaintiffs herein) were made parties defendant. All of the defendants being non-residents of the state, service of summons was obtained by publication in a newspaper, and such proceedings were afterwards had in that action that a decree of foreclosure was rendered in favor of said Gardner, and the land was ordered sold to satisfy the same. Enoch D. Scammon, one of the defendants herein, became the purchaser at the sale, and the same having been confirmed by the court, a deed was accordingly executed and delivered by the sheriff to him. Scammon took possession of the land under said deed, and he has been in possession thereof ever since, the other defendant, James Huston, being only his tenant from year to year. Plaintiffs in error claimed that all of the proceedings in the foreclosure case were absolutely void, and that Scammon got no title under his deed. On trial below before DAVIDSON, J., judgment was entered dismissing the case.

Martin & Gilman, for plaintiffs in error, cited: Comp. Stat., 539, § 76. *Allen v. Saylor*, 14 Iowa, 436. *Gray v. Palmer*, 9 Cal., 638. *Wade on Notice*, § 1158. *Reed v. Sexton*, 20 Kan., 200. *Crowell v. Galloway*, 3 Neb., 218. *Atkins v. Atkins*, 9 Id., 191. *Keys v. McDonald*, 1 Handy, 287.

E. W. Thomas, for defendants in error, cited: Maxwell's Pleading and Practice, 51. 1 Nash, 82. *Olcott v. Robinson*, 21 New York, 150. *Miller v. Finn*, 1 Neb., 254.

Howard v. Moore, 2 Mich., 227. Freeman on Void Jud. Sales, 109.

COBB, J.

The point is made for the plaintiffs in error that the service of process in the foreclosure case was not sufficient to bind the infant defendants, for the reason, as I understand it, that the affidavit for service by publication fails to show that the guardians of the infant defendants were non-residents of this state, or that service on them could not be made in this state, and it is urged in the brief that "there is always a presumption that when a minor has property and rights he has a guardian to protect such property and rights." If there is such a presumption, it certainly cannot prevail against the superior presumption that the surviving parent is the guardian of an infant, or that the infant would be domiciled in the same state with its guardian. Indeed, in the absence of authority, I am unable to admit the existence of a presumption that an infant who has inherited land in several different states has a guardian in each state to protect such property. The deposition of the plaintiff, Elizabeth J. Davis, one of the defendants in the foreclosure suit, shows clearly that at the date of the taking thereof, to-wit, the twenty-eighth day of May, 1883, she was a resident of the state of Missouri, and that the other defendants are her sons and daughters. She was not interrogated as to when she became a resident of the state of Missouri. Her deposition, then, taken in connection with the affidavit of non-residence of the defendants made by the plaintiff in the foreclosure suit, raises the presumption that all of the defendants were non-residents of the state of Nebraska at the time of the commencement of the foreclosure suit. And that the infant defendants, all but one of whom were then under the age of fourteen years, were then residing with and under the natural guardianship of their

mother—their father being then dead, and they cannot be presumed to have then had any lawfully appointed guardian, certainly not within the state of Nebraska. The case of *Keys v. McDonald*, 1 Handy, 287, cited to this point by counsel for plaintiffs in error, was where the summons was personally served, of course within the jurisdiction of the court, upon the defendant, who was stated in the petition to be a minor under the age of fourteen years. Such defendant being found within the jurisdiction, there was a presumption to be negatived that there was a father, mother, guardian, or other person having the care of such infant or with whom he lived, also within the jurisdiction, who also might be served. But not so in the case at bar.

The second point presented is, that by the terms of the notice the defendants in the foreclosure suit were not allowed the statutory time in which to answer the petition of the plaintiff therein. The statute [sec. 110, p. 545, Comp. Stat.] provides as follows: "The answer or demurrer of the defendant shall be filed on or before the third Monday * * * after the return day of the summons or service by publication." Sec. 79, p. 540, provides that: "The publication must be made four consecutive weeks in some newspaper * * * ." While I do not find any case in which this language has been construed by this court, or indeed by a court of last resort in any state, yet it is well known to the profession that it has uniformly been understood in this state, the same as though the language were that the notice should be printed or inserted in a weekly newspaper once in each week for four weeks successively, etc., and that the publication is deemed complete upon the distribution of the newspaper containing its fourth successive weekly insertion. Such has been my own observation, and I am informed has been that of my two associates on the bench, each of whom has long presided at the circuit and been familiar with the rulings of our courts as well in territorial times as during the existence of our

state government. Such construction having been uniformly placed upon the statute in question, it has become a rule of property in this state, and must be adhered to.

Upon the last point raised by the plaintiff in error, to-wit: that the sheriff's deed, having been acknowledged before the county clerk, should not have been admitted in evidence, I will only say, that, by an act of the legislature, approved February 24, 1883, Laws, 181, all acknowledgments heretofore taken by county clerks and their deputies are declared to be legal and valid. No reason is suggested why this law should not be deemed valid or have the effect to validate the deed in question, however faulty its acknowledgment under the law as it formerly stood.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

15	32
38	827
15	32
48	806
15	32
53	286

GREAT WESTERN MANUFACTURING COMPANY, APPELLANTS, V. HUNTER BROS. ET AL., APPELLEES.

1. **Practice in Supreme Court on Appeal.** When, upon the trial of a cause in the nature of a suit in equity in the district court, a judgment is rendered against the plaintiff in the nature of a non-suit, and upon appeal to this court it shall appear that the plaintiff had offered competent testimony sufficient to entitle him to a decree *prima facie*, this court will render or order a decree in his favor accordingly.
2. **Mechanic's Lien.** Any contract and furnishing, and delivery under it, of labor, material, or machinery for the erection, repair, or removal of any house, etc., sufficient to create an indebtedness between the owner thereof and the person furnishing and delivering such labor, materials, and machinery, is sufficient to create a lien therefor, under the first section of chap. 42, Gen. Stat.

3. ———. An agreement to manufacture at plaintiff's factory at Leavenworth, Kansas, and deliver to defendants, at the Missouri Pacific Railroad depot, in Atchison, Kansas, certain machinery for defendants' elevator at Valparaiso, Saunders county, Nebraska, and the furnishing and delivery of such machinery so that defendants placed the same in their said elevator building, is a furnishing of the same in the county of Saunders within the meaning of the third section of said chapter.
4. ———. The contract for furnishing certain machinery for a grain elevator contained a clause as follows, in substance: "Should shipment be made before payment in full, the title, right of possession, and ownership of the aforesaid machinery shall remain in the above first party until the note is paid," etc., *Held*, Not a waiver of a right to a mechanic's lien.
5. ———. The oath to the account of items of materials, etc., may be made by an agent of the party entitled to the lien. *Williams v. Webb*, 2 Disn., 430.

APPEAL from the district court of Saunders county.
 Heard below before GEORGE W. POST, J.

S. H'y Sornberger, for appellant, on right to the lien, cited: Phillips, 167, 389. *Jones v. Swan*, 21 Iowa, 181. *Howard v. Veazie*, 3 Gray, 233. *McCall v. Eastwick*, 2 Miles (Penn.), 45. *Gilcrest v. Gottschalk*, 39 Iowa, 311. On right of non-resident to have lien, cited: *Greenwood v. Mfg. Co.*, 2 Swan, 130. *Atkins v. Little*, 17 Minn., 342. On authority of agent, cited: *Williams v. Webb*, 2 Disn., 430. Phillips, 366.

Groff & Montgomery, for appellee Stone, contended that decree must be affirmed or appeal dismissed. *Wilcox v. Saunders*, 4 Neb., 570. On right to lien, cited: Gen. Stat., chap. 42, §§ 1, 7. *Bottomly v. Grace Church*, 2 Cal., 92. *Houghton v. Blake*, 5 Id., 240. *Hill v. Bishop*, 25 Ill., 349. *Hills v. Elliott*, 16 Sergt. & Rawle, 56. *Bailey v. Adams*, 14 Wend., 201. *Gorman v. Sagner*, 22 Mo., 137. The statute, § 7, excludes the idea of an agent making affidavit to secure the lien.

COBB, J.

This action was brought to enforce a mechanic's lien upon a grain elevator for elevator machinery by the plaintiffs, who are manufacturers, of Leavenworth, Kansas, the said elevator having been erected by the defendants, Hunter Brothers, at Valparaiso, Saunders county. Hunter Brothers, Harry White, and Frank C. Stone, trustee (to whom the property had been conveyed by Hunter Brothers in trust for certain creditors), were made defendants, the latter of whom only answered. Upon the coming on to trial to the court, the plaintiff offered certain pages of the records of Saunders county, containing the records of its liens, etc. The defendant objected to the introduction of the said record in evidence, for the reason that one of the issues in the case was the authority of the person making the affidavits, etc. The plaintiff also offered in evidence the deposition of D. F. Fairchild. To question 20 of said deposition and the answer thereto, the defendant objected, for the following reasons: 1. That the same is not the best evidence, and is incompetent. 2. That the testimony is seeking to extend the terms of the contract, which is in writing. To question 26 and the answer thereto, the defendant objected, for the reason that the same is incompetent, immaterial, and not the best evidence. To question 29 and the answer thereto, defendant objected, for the reasons: 1. That the same is incompetent, there being no ambiguity in the contract. 2. That the contract itself excludes all verbal understandings. All of which objections were sustained, and the several matters objected to ruled out.

The said deposition, except such parts as were objected to as above, also the contract referred to and which formed a part of said deposition, and several letters referred to in said deposition, were then admitted in evidence.

Plaintiff then offered the original affidavit of Geo. W.

Burton (being the account in writing of said mechanic's lien, recorded as aforesaid), to which the defendant objected, giving reasons too lengthy for repetition here.

Thereupon the plaintiff rested, and the defendant moved for a judgment on the plaintiff's testimony, which motion was sustained, and the cause comes to this court on appeal.

The defendant makes a preliminary point to the effect that the plaintiff cannot have judgment on its appeal in any event, for the reason that the plaintiff was non-suited at the close of its evidence, and before the defendant had an opportunity to produce his testimony. He says that, even admitting that the plaintiff made a case on its evidence, it is to be presumed that the defendant's evidence would have made a great difference, had the district court been in doubt about the motion for a non-suit.

On this proposition the court is compelled to differ with counsel. If any presumption is to be indulged in, it is that defendant was satisfied with the case as made by plaintiff's testimony, otherwise he would have put his own testimony in, before calling for the judgment of the court. At all events his motion for judgment on the plaintiff's evidence alone, and the favorable action of the district court on his motion, stamps it with the character of an *ex parte* case as well in this court as in that.

Defendant makes his first point on that part of plaintiff's claim which comes last in point of time, and says that it is invalid because the affidavit does not show the nature of the contract under which such material was furnished, or whether or not there was a contract. That part of plaintiff's claim to which this objection is made is in the following words: "That afterwards, to-wit, on the fifteenth day of August and on the twenty-fourth day of October, 1879, said Great Western Manufacturing Company did sell and furnish to said Hunter Brothers the within several items of machinery and material named in exhibit "B," hereto attached and made a part hereof, amounting to

\$55.22, to be by them used in and about the erection and completion of the elevator before described."

The defendant's second point, as applicable to the balance of plaintiff's claim, he divides into three heads: 1. That the materials in question were furnished, by the terms of the contract itself, at Leavenworth, Kansas, and as the statute requires that the liens shall be filed "in the county clerk's office of the county in which such labor, skill, and material shall have been furnished," the goods not having been delivered in Saunders county, no lien could be gained there.

2. The material must have been furnished *by the express terms of the contract* for the particular building on which the lien is claimed. No reference is made in this contract to the building on which the lien is claimed; therefore the lien was unauthorized, etc.

3. By the terms of this contract the title to the property was retained in the appellant until full payment should be made, etc.

Defendant cites cases where the holding has been with him under most of these heads. But it must be borne in mind that the lien which is now under consideration is the creature of statute, and that the statutes of no two states are exactly alike; nor do those of any state remain the same for a great length of time. The provisions of our own statute, in force at the time of these transactions, had been framed with a view of getting rid of all technical difficulties in the way of protection to mechanics and material men pursuing their business in good faith, and quite probably many of its provisions had been suggested by the cases cited and to avoid the technical difficulties suggested in some of them. Sec. 1 of said act reads as follows: "Any person who shall perform any labor or furnish any material or machinery for the erection, reparation or removal of any house, mill, manufactory, or other building or appurtenance, by virtue of a contract or agreement, ex-

press or implied, with the owner thereof or his agent, shall have a lien to secure the payment of the same, upon such house, mill, manufactory, or other building or appurtenance, and the lot of land upon which the same shall stand." Gen. Stat., 466.

From an examination of this section it must be apparent that it makes no difference what the nature or character of the contract may be, whether special, or parol, verbal, or written, express or implied. If the contract and delivery, or furnishing under it, is sufficient to create an indebtedness or liability, it is sufficient to create a lien under the provisions of this section. See Kneeland on Mechanic's Liens, § 48.

The objection that the machinery having been manufactured at Leavenworth, Kansas, and shipped to the purchasers at Atchison, Kansas, to be by them conveyed to the site of their elevator in Saunders county, Nebraska, was not a furnishing of such machinery in the latter-named county, has received careful attention; yet I do not think that either the letter or the spirit of the statute requires that the machinery should be actually laid down at the site of the building, by the lienor, but if his labor, skill, or capital produced it, and set it in motion for that destination, and it finally reached it, and was attached to the building for the purpose intended, then it was "furnished" there by him without regard to the name in which it was shipped or other matters connected with its transportation. As to the second subdivision of this objection, I have no doubt that, under the provisions of our statute then in force, lumber or other building material, sold on general book account without regard to any particular building, if used by the purchaser in the erection or reparation of a building upon land of which he is the owner, the vendor of such lumber or other building material may have his lien. Whatever may be the provisions of the statutes of Illinois and California under which the cases cited were decided, they are

G. W. Mfg. Co. v. Hunter Bros.

not authority under our statute. As to the third subdivision of this point, that plaintiffs cannot have a mechanic's lien for the machinery furnished for the reason that by the terms of the contract they retained a vendors' lien on the machinery, while I find some difficulties presented in some of the cases cited, yet as it is a general principle of law that a creditor may have as many securities for his debt as he can obtain without infringing upon the rights of others, and as the rights of no other person have been by any possibility affected by the said clause in the contract, I do not deem it as an objection to the plaintiff's right to a lien. Again, the vendor's lien or ownership of the machinery reserved by the terms of the contract could only exist so long as the machinery remained personal property, and ceased upon the same being attached to the freehold and becoming a fixture. Hunter Bros. having attached this machinery to their elevator (with the consent of the vendor), it ceased to be personal property, and the reserved ownership of the vendor therein ceased to operate *eo instanti* with the act which entitled said vendor to a lien on the elevator therefor. See *Frankland et al. v. Moulton et al.*, 5 Wis., 1.

The lien in this case was verified by G. W. Burton, who in his affidavit declares that he is the agent of the Great Western Manufacturing Company, claimants in this case. The point is made that under the statute no one but the lienor himself could make the verification. I know of no reason why cases of this kind should be taken out of the general rule, and therefore, in the language of Judge Gholson, in *Williams, adm'r, v. Webb*, 2 Disn., 438, "We see no reason to doubt that the oath of an agent, acting in the business, and therefore acquainted with the facts, is sufficient. Any other conclusion would be attended with extreme inconvenience, and we think that the general maxim, *qui facit per alium, facit per se*, may be safely applied in the construction of this statute."

I think that the court should have so received and con-

Laughlin v. Kavanaugh.

sidered all of the depositions of the witness Fairchild except the twenty-ninth question and answer, and such testimony being before the court the plaintiff's claim was sufficiently proved.

The judgment of the district court is therefore reversed, and the cause remanded to the district court, with the direction that a decree be entered in that court for the plaintiff, giving it a first lien on the said grain elevator building, as described in plaintiff's petition, for the sum of \$278.77, together with interest on \$223.65 from the 25th day of July, 1879, and on \$55.22 from the 24th day of October, 1879, together with its costs in both courts.

JUDGMENT ACCORDINGLY.

THE other judges concur.

PETER LAUGHLIN, PLAINTIFF IN ERROR, v. D. C. KAVANAUGH, DEFENDANT IN ERROR.

1. **Practice:** SETTING ASIDE VERDICT IN REPLEVIN. The only manner in which this court will set aside the verdict of a jury in a district court in an action of replevin is by reversing the judgment of said court in sustaining and refusing to set aside such verdict.
2. **New Trial.** A new trial will in no case be granted in an action at law while a verdict of a jury in such action remains in force.

ERROR to the district court of Platte county. Tried below before GEORGE W. POST, J.

Byron Millett, for plaintiff in error.

Cornelius & Sullivan and *George G. Bowman*, for defendant in error.

COBB, J.

This cause was submitted to the court by stipulation of the parties without brief or argument of any kind. There was no bill of exceptions, the record consisting of the pleadings, general verdict and special findings of the jury, judgment, and petition in error. The action was replevin in the *detinet* for certain pieces of mural marble. The defendant answered by a general denial. The jury found a general verdict, "the value of the property in question two hundred dollars. That the plaintiff is the owner of the property now, and was at the time of the commencement of this cause; that the said defendant is entitled to the immediate possession thereof; that the plaintiff wrongfully took the said property; that the value of the defendant's possession of, in, and to the said property is one cent; and that said defendant is entitled to one cent damages for the wrongful taking of said property." There are also nine special findings, as follows:

1. Was there a partnership proved between the defendant Laughlin and one James F. Bronlette, on or about the first of October, 1880, at the city of Columbus, Nebraska? A. We did not find any legal partnership.

2. If your answer is yes, what was the nature of the partnership business? A. Nothing.

3. Was the property replevied in this action a part of the assets of such partnership? A. No.

4. When was such partnership dissolved? A. Never existed.

5. When this action was begun, on the twenty-second day of April, 1881, and the property replevied herein, did the defendant Laughlin hold this identical property by virtue of an order of delivery in replevin out of the county court in and for Platte county on the thirtieth day of December, 1880, in a certain action in such court wherein said Laughlin and James H. Bronlette were plaintiffs and said D. C. Kavanaugh was defendant? A. Yes.

Laughlin v. Kavanaugh.

6. If your answer is yes, to last question, is such action now pending in this court? A. Yes.

7. What was the value of said property at the commencement of this action? A. Two hundred dollars.

8. What was the value of the plaintiff Kavanaugh's interest and also the defendant Laughlin's interest in such property at that time? A. Kavanaugh's interest, one hundred and fifteen dollars; Laughlin had no interest at that time.

9. What was the value of Peter Laughlin's possession of the property in question at the time of the commencement of this action? A. None.

There was no motion to set aside these verdicts or either of them or for a new trial. The court rendered judgment thereon "that the said plaintiff retain the property in controversy in this case, and it is further considered and adjudged by the court that the said defendant have and recover of and from the plaintiff one cent damages and one cent value of possession of the said defendant in and to the property in question, as found by the jury, and his costs herein expended, taxed at \$36.43."

The defendant in the court below now brings the cause to this court on error. He assigns several errors, or rather one error in several different ways, to-wit: that the special findings are inconsistent with each other, and neither sustain the general verdict nor do they with the general verdict sustain the judgment.

Having neither the testimony in the case nor brief of counsel to which to refer, this court can only be expected to take a general view of the point thus presented. The plaintiff in the court below, by his affidavit and petition, claims to be the owner of the chattels replevied. The jury, by their general verdict, find the value of the property to be two hundred dollars, and by the eighth paragraph of their special findings they find the value of the plaintiff's interest in the said chattels at one hundred and fifteen dol-

lars. And so the plaintiff in error claims in his petition in error that the plaintiff below did not recover *secundum allegata*. This objection may have been well taken, had the attention of the trial court been called to it, but made for the first time in the petition in error, and neither sustained by bill of exceptions nor explained by brief or argument, this court must presume the existence of something in the case not disclosed in the record which would prevent its application.

In the case of *Mills v. Miller*, 2 Neb., 299, at page 317 of opinion, this court, by Mr. Justice CROUNSE, say: "Appellate courts are provided to review the proceedings and correct the errors of inferior ones. Before a party is entitled to be heard here, he must have exhausted his remedy in the court below. For that purpose he must have presented the several questions of law fairly and fully, and must have obtained an unequivocal ruling thereon. If dissatisfied with the decision of the court he may preserve an exception * * * We will not guess that error was committed. It is the duty of the party complaining, not only to show that error occurred prejudicial to him, but to present here a record showing affirmatively and clearly that such is the fact."

An examination of the provisions of the statute regulating replevin, §§ 190, 191 and 191a, of the civil code, cannot fail to show that the plaintiff in error has no remedy while the verdict stands against him, and before he can ask this court to set aside said verdict he must have been denied the same by the district court.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

THOMAS H. HARRISON, PLAINTIFF IN ERROR, V. J. THOMP-
SON BAKER ET AL., DEFENDANTS IN ERROR.

15	43
20	514
15	43
62	742

1. **New Trial.** Immaterial and irrelevant testimony admitted over defendant's objection, and which may have a tendency to mislead the jury, is good ground for a new trial.
2. **Charge to the Jury where there is no Evidence to which it is Applicable.** Where the court in charging the jury gives an instruction not called for by the evidence, and which is calculated to mislead them, the judgment will be reversed *High v. Merchants Bank*, 6 Neb., 155.
3. **New Trial: VERDICT AGAINST EVIDENCE.** Although a verdict supported by proof will not be disturbed because of an erroneous instruction on an abstract proposition of law on a point not in the case, yet where the evidence is conflicting and evenly balanced, and there is testimony on the other side entitled to equal consideration, the verdict will be set aside and a new trial granted. *Meredith v. Kennard*, 1 Neb., 312, cited and distinguished.

ERROR to the district court for Gage county. Tried below before WEAVER, J.

Bush & Rickards, for plaintiff in error.

J. H. Broady and J. E. Cobbey, for defendants in error.

COBB, J.

The pleadings and testimony in this case are quite voluminous, but having reached the conclusion that there must be a new trial on account of error in the reception of certain objectionable testimony offered by the defendants in error, and the giving of certain improper instructions to the jury, we will confine ourselves to so much of the record as may be necessary to the presentation of those points.

The plaintiffs below, as the assignees of James S. Marsh, claimed the ownership of a large number of reaping ma-

chines, which were in a shed or warehouse owned by Oliver Townsend, at Beatrice, Gage county. These reaping machines had been held by the sheriff, by virtue of a writ of attachment, but the levy thereof seems to have been released at the time that Baker, one of the plaintiffs, took nominal possession thereof in the name of the assignees. The plaintiffs claim, as well in their petition as in the testimony of Baker, that at that time he entered into an agreement with the defendant, in which the defendant agreed to take charge and possession of the machines as agent of the assignees, to take care of the property and keep the assignees "informed of everything that might transpire concerning it, and of any proceeding affecting it which might take place, and he was to inform them immediately if any attempt should be made to seize them, or if any attachment or writ should be served concerning the machines."

It appears that after the said Baker left Beatrice, the said reaping machines, or a part of them, were levied on by the sheriff and sold to satisfy a fee bill, then in his hands, against the said James S. Marsh, assignor of the plaintiffs, and bid in by the said defendant in the name of a brother of his, at a price far below their value, and it was for the sacrifice and loss of these machines that this suit was brought.

There was evidence tending to prove all of the above facts, sufficient, we think, to have sustained a finding for the plaintiffs had they relied only on proper testimony. But, for some reason not apparent to the writer, they conceived it necessary to their case to prove that at the time of Mr. Baker going to Beatrice, looking at the machines, and employing the defendant to look after them, they had not been levied upon by virtue of the second attachment. For that purpose they introduced Mr. Broady as a witness, who, *inter alia*, testified as follows: "In regard to the conversation with Mack, the sheriff, I think it was the last day of the court, the fall term, the last of October or first of

November, I cannot fix the date. * * * We were going down from the court house with Mack; near Clark's corner he asked Mack." Objected to by the defendant's counsel as immaterial, incompetent, etc. Objection overruled, and defendant excepts. "I asked if *alias* attachment had been levied on these machines. He said he did not know; the writ was in the hands of the deputy. Just then the deputy came walking across from towards the Emory House. He called him up and asked him if the writ had been levied, and he said not. I know he occupied the position of bailiff or deputy sheriff. Then Baker notified him he had taken possession of the machines, and no one had any right to seize them but himself, or by his authority, and forbid his taking the machines under any writ. He warned him from levying on any of the machines." Defendant's counsel objects, and asks to have the conversation with Mack stricken out. Overruled and excepted to. A similar statement of these conversations is contained in the deposition of J. Thompson Baker, one of the plaintiffs, taken and introduced on the part of the plaintiffs, which testimony was moved to be stricken out by the defendant before the reading of said deposition to the jury, which motion was refused.

We know of no rule of evidence upon which this testimony was admissible. If it was intended to establish the fact to the jury that the *alias* attachment, or the fee bill, upon which the machines were afterwards sold, had not then been levied on them, it can scarcely be claimed that the statement of the sheriff or his deputy out of court would be the best evidence, or any evidence, of that fact. And certainly, under the issues in this case, no statement made by the sheriff, or his deputy, in the absence of the defendant, is admissible against him. While we may not be able to see what particular effect this testimony had upon the jury, it was well calculated to divert their minds from the true issues involved in the case, and it was the right of the

defendant to have his case go before the jury without being encumbered with illegal or irrelevant matter.

Among other things given by the court in charge to the jury, we find the following assigned for error by the plaintiff in error: "If the jury believe from the evidence that defendant connived and planned to prevent competition of bidders at the sale of the property described in the petition under the fee bill in evidence, and to cause a sacrifice of the property at such sale, and did thereby damage the plaintiffs, then they must find for the plaintiffs, irrespective of whether defendant had agreed to take care of the property as alleged in the petition."

Aside from the unfortunate use of the word *connive*, we have no fault to find with this instruction, only that it had no application either to the testimony or theory of the plaintiffs' case. If the defendant is liable at all his liability depends entirely upon his having agreed, either expressly or impliedly, to act as the agent of the plaintiffs in the care of the property. If he made such agreement and afterwards allowed the property to be sold by the sheriff without notifying his principals, but bid it off himself in the name of a stranger to the plaintiffs, he is liable, yet the capital link in the chain of his liability, upon which all the rest hang, is his agreement. The jury, then, should not have been told that in any event they could find for the plaintiff, unless they should believe from the evidence that the defendant entered into the agreement with the plaintiffs to take charge of the property, etc. Again, there was no testimony before the jury that the defendant connived—in whatever sense that word may be used—or planned to prevent competition of bidders at the sale of the property, nor that there was not all the competition at the sale that could be expected or was desired.

In the case of *Meredith v. Kennard*, 1 Neb., 312, the law is stated in the syllabus, as follows:

"4. When the court gives the jury instructions not re-

quired nor called for by any evidence adduced in the cause, and it appears that such unnecessary instruction misled the jury in its consideration of the facts of the case, the judgment will be reversed.

"5. If an erroneous charge be given on an abstract proposition, or on a point not in the case, and the verdict is supported by proof in the cause, the judgment will not be reversed."

We find it difficult to apply these rules to the case at bar, for the reason that the evidence is so conflicting and evenly balanced on what we regard as the fundamental facts of the case that, while, had the jury reached their verdict without the help of improper evidence or an erroneous instruction, we would say that there was legal testimony to sustain it, yet it cannot be denied that there is also considerable testimony on the other side, possibly entitled to equal consideration from the jury, and we fail to appreciate the justice or fairness of a rule which would allow a party to gain a verdict aided in part by illegal testimony or an erroneous instruction, and allow such verdict to stand because possibly sustained by a feather's weight preponderance of unobjectionable evidence.

The judgment is reversed, and the cause remanded to the district court for further proceedings according to law.

REVERSED AND REMANDED.

A re-hearing of this case was had after the filing of the above opinion, and the judgment of reversal re-affirmed, all the judges concurring.

15	48
15	285
16	84
23	846

15	48
33	106

15	48
28	747

15	48
38	391

E. N. FOSTER, PLAINTIFF IN ERROR, v. PIERCE COUNTY,
DEFENDANT IN ERROR.

1. **Taxes: VOLUNTARY PAYMENT.** Money paid as taxes voluntarily, and without protest, cannot be recovered back as matter of account against the county.
2. **—: PUBLIC LANDS: PAYMENT: RECOVERY BACK.** Money paid as taxes or redemption money on lands, the entry of which has been suspended by the land department of the general government on account of the failure of the local land officers to account for the entrance money to the United States accounting officers, cannot be recovered back from the county pending such suspension. Whether it can after such entry is finally canceled, if that may be, not decided.

ERROR to the district court for Pierce county. Heard below before BARNES, J.

James H. Brown and Thurston & Hall, for plaintiff in error.

F. P. Wigton, for defendant in error.

COBB J.,

The account of the plaintiff against Pierce county, made out in fair mercantile form, and verified by his attorney, claiming \$435.87 as due from the said county to the plaintiff, was presented to the county board, by which it was duly examined, considered, and rejected. The plaintiff took an appeal to the district court, where the cause was dismissed, on motion of the defendant, "for the reason that the claim does not show a demand which the defendants were authorized to act upon." And the plaintiff brings the cause to this court on error. The errors assigned are, the sustaining by the district court of the motion to dismiss the cause for the reasons stated, and the entry of a judgment of dismissal and for costs against the plaintiff.

The district court, as well as counsel in that court and in this, treat the said account as a petition, and the motion as presenting the question whether the said account stated facts sufficient to constitute a cause of action against the defendant. The account consists of fifteen items; one is "To tax 1873, redemption from sale as per cert." Seven are for the specific amounts of taxes paid each year from 1874 to 1880, both inclusive; and the other seven consist of items of interest at ten per cent on each payment of taxes to the date of the presentation of the account.

At the foot of the account is the following statement: "The above taxes were paid by E. N. Foster on the south one-half north-west quarter, 32, 25, 2, which land belongs to United States, as shown by accompanying certificate." Then, after the verification of the account, follows a letter signed by the register of the United States land office at Norfolk, in which, after giving the description of the land as above, he adds: "I hereby certify that the records of this office show that the said tracts are vacant, the United States, not having received legal compensation therefor, has never parted with a taxable title to the same."

The above, together with copies of the tax receipts and certificate of redemption, constitute the whole case as it stood, as well in the district court as before the county commissioners, so that so far as the record shows the redemption of the lands in question from the sale for the taxes of 1873, and the payment of the taxes thereon for the seven years following, was entirely voluntary on the part of the plaintiff. There is no suggestion that these lands were assessed as the property of the plaintiff or that he ever claimed or occupied them, nor is it even suggested that these taxes were paid by mistake or misinformation or error of any kind.

An examination of the record fails to develop any ground or theory upon which the plaintiff has made a case against the county which, in any possible view, would entitle him

to recover. Money paid by mistake of fact, may, in some cases, be recovered back in an action at law, but in all such cases the mistake must be pleaded and proved. The statute makes ample provision for the reclamation of money paid under protest for the discharge of illegal taxes; but I know of no exception to the rule that money voluntarily paid cannot be recovered back at law.

If we go outside of the record and look into plaintiff's brief, we learn that in February, 1872, one George D. Hitzell made application to enter the lands in question, "they then being subject to entry, and duly paid the fees and received the certificate of entry in due form from the proper officer. This land, thereafter, by various conveyances, became the property of the plaintiff in error, who, as such owner, paid the taxes assessed against said land for the years 1873, etc." That "after such payments, and during the year 1881, the plaintiff in error discovered that owing to a fraud on the part of the officers of the government, the fees had never been paid to the authorities at Washington, and that the title still remains in the United States," etc. There is no proof whatever of this state of facts, and it can scarcely be possible that they exist as stated. The title to land once the property of the United States does not necessarily depend upon the fact of fees or entrance money being paid to the authorities at Washington. And if the statement that the lands were subject to entry, that Hetzel made application to enter them and did enter them in due form of law, paid the entrance money and fees, and received the certificate of entry in due form *from the proper officer*, be true, it is not to be believed that the government of the United States will finally refuse to issue a patent to him accordingly. When a party pays money to a receiving officer of the government, and receives a proper voucher therefor, he is not an insurer that such money will finally reach the treasury of the United States, and I have never heard of an instance where such party has been denied the

benefit of such payment because of the defalcation of such officer. Nor will it be in this instance. For prudential reasons of administration the recognition of such payment may be delayed for an apparently unreasonable length of time, but if really made in good faith and free from collusion with the derelict officer receiving it, it will finally be made. When such recognition is made it will not be of a title emanating from the United States at that time and founded on such recognition, but of one which passed out of the United States by virtue of the entry when made, and deriving its vitality from such entry and payment.

It is not deemed necessary to discuss the question of the taxability of lands after entry and before the issuance of the patent. I believe that it is now universally conceded that such taxation is not an interference on the part of the state with the federal government in the primary disposal of the soil, and it was held by this court in the case of *Beltinger v. White*, 5 Neb., 399, that "a homestead is liable to taxation as soon as the owner has the right to make his final proof and complete his title." It necessarily follows that it would remain taxable after proof and full payment made, although the patent might never be issued.

It will thus be seen, whether we try this case by the record or by the facts as stated in plaintiff's brief, that the judgment cannot be disturbed.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

ALL of the judges concurred.

15	52
30	889
15	52
30	250
15	52
49	663

JOHN FITZGERALD, PLAINTIFF IN ERROR, V. B. BELL ANDREWS ET AL., DEFENDANTS IN ERROR.

1. **Bill of Sale: CHATTEL MORTGAGE.** A bill of sale in the nature of a chattel mortgage is good as between the parties to it without being filed, as the statute directs.
2. ———. And the neglect to so file the instrument, although making it void as to creditors of the seller, is available only to such of them as, by a lawful seizure, acquire a lien on the property while in his possession.
3. ———: **POSSESSION.** Where a bill of sale or chattel mortgage conveys, in absolute terms, the entire interest of the seller, without reservation, the vendee or mortgagee may, without demand, take possession of the property whenever he sees fit to do so. In such case the instrument itself is a continuing authority to him to do so, which he may exercise at his own pleasure.
4. ———: **MAKING OF ON SUNDAY.** A bill of sale made on Sunday is not invalid.

ERROR to the district court for Nemaha county. Tried below before DAVIDSON, J.

J. H. Broady, for plaintiff in error.

1. The property covered by the bill of sale and replevied was absolutely exempt from judgment creditors by force of the statute without any action of any one to give the exemption effect. Comp. Stat., p. 600, § 530. Maxwell Justice Pr., pp. 98, 99. *William v. Golden*, 10 Neb., 434.

2. The property being exempt was not the subject of a fraudulent sale as to creditors. *Boggs v. Thompson*, 13 Neb., 408. *Derby v. Weyrich*, 8 Neb., 174. *Thompson on Exemptions*, § 411.

Osborn & Taylor, for defendants in error.

1. Record shows that action was commenced in county court; does not show that O'Leary was a *bona fide* res-

ident of the county or state, or that he ever claimed to be; and we claim that the conveyance is, if anything, a chattel mortgage.

2. On right of plaintiff to maintain action see *Haggard v. Wallen*, 6 Neb., 272. *Williams v. West*, 2 Ohio State, 85. *Goodman v. Kennedy*, 10 Neb., 273.

3. Right given by statute of exemption is a personal privilege, and may be waived by debtor. Thompson, § 438. *Angell v. Johnson*, 2 N. W. R., 435. *Haven v. Melogue*, 9 Ind., 196. *Brown v. Leitch*, 31 Am. Rep., 43. *Conlee v. Chilcote*, 25 Ohio State, 320. *Butt v. Green*, 29 Id., 667.

4. Not being placed on record the mortgage is void. *Becker v. Anderson*, 11 Neb., 494. *Philips v. Reitz*, 16 Kan., 396.

LAKE, CH. J.

This is a petition in error from Nemaha county. The action in the court below was in replevin to recover possession of a lot of household goods, consisting of one stove and furniture, twenty pairs of blankets, fifteen quilts, and some dishes and table furniture, to which the plaintiff claimed he was entitled under a bill of sale made to him by one Dennis O'Leary, on the 27th of August, 1881, to secure the payment of the sum of fifty dollars for money borrowed. That this was the object of the bill of sale was proved beyond all doubt.

After the giving of this bill of sale, O'Leary continued to hold possession of the goods until the 7th of October following, when the plaintiff, by his agent, took them into his own custody. Thereupon, the defendant Andrews caused them to be seized under an execution that day issued on a judgment in his favor against O'Leary. The question in the court below, therefore, was simply, which had the superior right, the plaintiff with his bill of sale, or the defendant under his execution?

In support of the finding and judgment of the district court, it is urged by defendant's counsel that the bill of sale being in effect simply a chattel mortgage, and not filed with the county clerk, as the law requires to make it effective as to creditors, was void as to him, and the property covered by it liable to seizure in satisfaction of his judgment. Comp. Stat., Chap. 32, Sec. 14.

Doubtless the property would have been liable to be so taken while it remained in the hands of O'Leary, notwithstanding the formal sale to the plaintiff. During all of that time, the sale, although for a good consideration, was of no effect as against O'Leary's creditors, who might acquire liens thereon by attachment or execution, unless protected under a claim of exemption. But, as between O'Leary and the plaintiff, the sale was perfectly good without being so filed, although void as to the creditors of the latter. *Becker v. Anderson*, 6 Neb., 499. *Conchman v. Wright*, 8 Id., 1. *Gregory v. Whedon*, Id., 373.

The defendant's judgment, however, was not of itself a lien on the property, nor could it become such except by the levy of an execution issued upon it. But before the defendant's execution was levied, and a lien thus obtained, the plaintiff had perfected his own by taking possession of the property, and thereby obviated the necessity of giving the statutory notice to O'Leary's creditors, by filing his bill of sale, of what his interest in the property was. With the property in the plaintiff's possession, or in that of his agent, his right to it as a security, which before was in peril of seizure by creditors, was made secure; for actual possession of personal property is notice to the world of the possessor's right to it. The controversy between the parties respecting this property is, therefore, really one of priority of lien, in which the evidence shows beyond all doubt that the plaintiff has the advantage of a few hours.

The filing of a chattel mortgage is required only where possession of the property is retained by the mortgagor.

And, to enable a creditor to take advantage of the neglect to file, he must, by a lawful seizure, acquire a lien on the property while it is in the possession of the mortgagor.

But it is argued that there is no provision in the bill of sale authorizing the mortgagee to take possession of the property, and that he did so without demanding it, and without O'Leary's consent. As to the matters of demand and consent, the evidence leaves room for doubt—it is conflicting. But they are entirely immaterial. The bill of sale is absolute in its terms, and conveys O'Leary's entire interest in the goods to Fitzgerald. The right of possession not being retained by O'Leary, the instrument itself was an authority to Fitzgerald to take the goods whenever he saw fit to do so, without demand. And this authority was neither surrendered nor forfeited by Fitzgerald's failure to act upon it at once, but it continued for his benefit, to be exercised at his own pleasure.

The fact that the sale was made on Sunday, although mentioned by counsel, does not seem to be relied on to defeat it; nor could it be successfully. *Horacek v. Keebler*, 5 Neb., 355.

O'Leary was called as a witness for the defendant. In his examination in chief, this question was put to him: "State if you informed Billy Fitzgerald, and did he not so understand, that you gave him said bill of sale of your own accord to prevent your creditors from collecting their claims?" This was objected to on behalf of the plaintiff, as leading; but the objection was overruled and the witness answered, "Yes, sir." This was error. The question was clearly leading, and the objection ought to have prevailed.

It is not entirely clear, from the record, upon what precise grounds the court adjudged against the plaintiff, but they seem to have been the following findings of fact, viz.: 1st, that "there was no delivery of possession to plaintiff under said bill of sale." 2d, that "immediately before the levy

Rawalt v. Brewer.

of the execution * * * the agent of the plaintiff, without consent of the maker of the bill of sale, had taken possession of the property in the absence of said maker." The first of these findings is entirely immaterial, being made so by the second, which is really in favor of the plaintiff, inasmuch as it shows that he had perfected his lien, and obviated the necessity of a filing of the bill of sale.

For these reasons the judgment must be reversed and a new trial ordered.

REVERSED AND REMANDED.

THE other judges concur.

BENJAMIN F. RAWALT, PLAINTIFF IN ERROR, V. EUGENE BREWER, DEFENDANT IN ERROR.

Practice in Supreme Court. In a case brought to this court on error or appeal, and no brief is furnished or filed for the use of the court, as required by rule VII., or, for cause shown, the operation of such rule be suspended as applicable to such case, the judgment or decree will be affirmed, unless there is error plainly apparent on the face of the record.

ERROR to the district court for Clay county. Tried below before MORRIS, J.

Batty & Ragan, for plaintiff in error.

W. S. Prickett, for defendant in error.

COBB, J.

This cause is brought to this court on error, but the plaintiff in error has failed to furnish the clerk with printed copies of his brief and points relied upon, as required by

Hullhorst v. Scharner.

rule VII. This rule is imperative in its language, and while it may not have been rigidly enforced in all cases heretofore, the time has arrived, in the opinion of the court, when its violation can be no longer tolerated. If the time ever was when the business of the court was such that its members could find time to search the record of causes for the points which the court ought to consider, and then search the library for authorities, aided only by the digests, that time is past. The vastly increased business of the court renders it necessary that all rules calculated to facilitate the members of the court in the discharge of their duty be enforced, and probably others adopted.

There being no error apparent on the face of the record, the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

15	57
26	305
15	57
44	627
44	670

C. G. A. HULLHORST, APPELLANT, V. CHRISTIAN T.
SCHARNER, APPELLEE.

Negotiable Instruments: OBTAINING BY DURESS AND FRAUD.

One who obtains a note and mortgage from an irregular practitioner of medicine by means of threats to send him to the penitentiary for having made an alleged indelicate, indecent, and injurious examination of the daughter of the former while treating her for supposed suppression of the menses, obtains no lawful property in such note or mortgage, and the same will be enjoined.

APPEAL from the district court of Platte county. Heard there before GASLIN, J., sitting for GEORGE W. POST, J.

M. Whitmoyer and *John G. Higgins*, for appellant, cited: *Foshay v. Ferguson*, 5 Hill, 154. Lord Coke, 2

Inst., 843. *Inhabitants of Whitefield v. Lowell Longfellow*, 13 Me., 146. *Richards v. Vanderpoel*, 1 Daly, 71. *Thurman v. Burt*, 53 Ill., 129.

G. G. Bowman and J. G. Reeder, for appellee, cited: *Gates v. Shutts*, 7 Mich., 129. *Vandyke v. Davis*, 2 Mich., 144. *Weed v. Terry*, 2 Douglass, 344. *Kercheval v. Doty et al.*, 31 Wis., 476. *Brooklyn Bank v. Waring*, 2 Sanford, 2. *Steele v. White*, 2 Paige, 478. *Simon v. Wilson*, 3 Edwards, 36. *Wehrinn v. Kuhn*, 61 New York, 623. *Thompson v. Nelson*, 28 Ind., 431. *Stewart v. Abrenfeldt*, 4 Denio, 189. *Moore v. Adams and Newkirk*, 8 Ohio, 372.

COBB, J.

This action was brought by the plaintiff in the court below, for the purpose of enjoining the negotiation and transfer of a certain note and mortgage, and for the delivery up and cancellation thereof for the reason that the same were procured by the defendant from the plaintiff without lawful consideration, but by means of duress and fear of prosecution, imprisonment, and disgrace upon the false charge of having made an indecent assault upon the infant daughter of the said defendant, and for the recovery of fifty dollars by him paid on said note, with interest thereon.

There was a trial and decree for the defendant, and the plaintiff brings the cause to this court by appeal.

It appears, from the testimony in the case, that the plaintiff was, at the date of the transactions material to this case, a preacher of the gospel, of the German Reformed sect, located at Columbus, in this state, and pastor of the German Reformed Church, at that place. That he had also paid some attention to medicine, had studied medicine in a medical college, and claimed to possess considerable skill in the science of medicine. That, while acting as pastor of the said church at Columbus for a period of some few years prior to the circumstances upon which this action

is founded, he had at divers times administered medical treatment, after the homœopathic system, to certain members of his said congregation. That the defendant and his family were members of the said German Reformed Church and congregation at Columbus.

It further appears that, on or about the last day of July, 1881, the plaintiff was sent for by the defendant to see the daughter of the latter, Lizzie, a girl between fourteen and fifteen years of age, who was then sick. In response to the said call, the plaintiff visited the house of the defendant, where he found the daughter, Lizzie, suffering from a slight fever, headache, and other symptoms, which in the opinion of the plaintiff indicated suppressed menstruation. That after administering medicine to her, and calling to see her two or more times, he came to the conclusion, and so stated to the defendant and his wife, the mother of the girl, that the cause of the girl's suffering was that the menstrual function was coming on, but was prevented by a mechanical obstruction. That after full consultation with the two parents of the girl as to the necessity of making an examination to ascertain the presence of such mechanical obstruction—whether such examination should be made by the plaintiff, or a physician of the city be called in for that purpose, after receiving the consent of the defendant, and of the girl, and in the presence of and with the assistance of the girl's mother, he made what he called a digital examination to ascertain the existence of such mechanical obstruction to the menstrual flow. This examination did not prove satisfactory either to the plaintiff or to the parents of the girl; nor did the patient find any immediate relief. This examination was made on Saturday evening. The plaintiff continued to visit and administer to the patient until Monday evening, following, when he was notified, by a member of the family, that another physician had been called, and that his further services were dispensed with. During that week plaintiff was informed in various ways

Hullhorst v. Scharner.

that the defendant was greatly dissatisfied with his treatment of the girl, and that he, together with other parties, was engaged, with considerable success, in fomenting an excitement against him for having subjected the girl to said examination, and on the following Monday he went to the office of the attorney of the defendant, and executed the note and mortgage referred to. And also then and there paid to the defendant, or his attorney, fifty dollars on the said note, which was endorsed thereon.

The plaintiff claims, and so testifies, that he was induced to make the note and mortgage solely by reason of the threat of the defendant to send him to the penitentiary for what he had done to the girl, and his fear that such threat would be carried into execution, and his dread of the disgrace to himself and family, and the society under his pastoral care, which would follow such imprisonment. This is denied by the defendant, who alleges that the note and mortgage were given in settlement and compromise of a civil action for damages which he was about to commence against the plaintiff for malpractice in the treatment of his said daughter. The question for this court to decide is, whether the decree of the court below is sustained by the testimony. After a careful examination of the testimony, and fully allowing all proper weight to the double presumption, which must be overcome in an appellate court by a plaintiff who has failed in the court below, we think that the plaintiff is entitled to relief.

There is but little conflict in the testimony. John Stauffer, the county clerk, testified that, on or about the day in question, the defendant came to the house of witness on Sunday evening, "and wanted to know (I quote the language of the witness) if Hullhorst had any property, any real estate, and I told him that he had; that he had the house he was living in then. And then he wanted to know how he could get hold of that property. He wanted me to tell him how to proceed to get that property. I told

him that I could not tell him ; that I was not an attorney. And he then made the remark that Dr. Hullhorst had attended his girl, that the girl was sick, that he did not treat her right, and that, if he would settle with him and give him that property, it would be all right, otherwise he would send him to jail and to the penitentiary." This was communicated to the plaintiff the following day. This same threat to have the plaintiff arrested and sent to jail and the penitentiary was made by the defendant to other persons, and by them communicated to the plaintiff, and with surroundings which we think warrant us in assuming that they were made for the purpose of being conveyed to him. And it was these threats, and the fear that they would be carried into effect, that, according to the testimony of the plaintiff and his wife, caused them to execute and deliver the note and mortgage. And there is scarcely any conflict of testimony as to these facts.

The defendant himself was a witness on his own behalf, and upon being interrogated refused to deny the facts or any of them sworn to by Stauffer or of his having made similar threats in the presence of the two Sperrys and M. Bucher, which threats were immediately communicated to the plaintiff and his family by Bucher, through Fred Garber and his sister, Mrs. Koomer. It is true that it is proved on the part of the defendant, by his own oath as well as by that of Mr. Geer, who acted as his attorney in drafting the papers in question, that no threats of arrest or imprisonment were made at the immediate time when the papers were executed. But it was by no means necessary or probably safe to the success of what we are forced to regard as the crafty and insidious scheme of the defendant, that it should be fully developed to his attorney or in his presence.

If, then, the plaintiff was induced to give the note and mortgage solely by reason of the threats of prosecution, imprisonment, and disgrace made by the defendant, in that

case the transaction was lacking in all of the essential elements of a contract. It was without consideration to the plaintiff, and equity will not allow the defendant to enjoy the fruits of it.

Willard, in his work on Equity Jurisprudence—a work cited by both parties in this case, says: “One who induces another who has been illegally arrested to part with his property, through fear of imprisonment, either to settle a civil suit then pending between the parties, or to compromise an alleged felony, obtains no title, and the transaction is void. Actual imprisonment is not necessary to avoid such a transaction; fear of imprisonment is enough. *

* * As civilization has advanced, so in degree have the courts more and more strongly been disposed to overthrow everything which has its basis in force, violence, or fraud. Though the law has been ever the same, its enunciation from time to time grows more emphatic. Duress *per minas* is sufficient to avoid contracts made under it, and even the fear of imprisonment is sufficient.” Pages 208–9. The author cites many cases which fully sustain the text.

Without considering the testimony of the plaintiff or his witnesses as to what caused him to give the note and mortgage in question, it could scarcely be credited as possible that any sane man would mortgage his homestead for that amount of money in the compromise of a claim for malpractice, where the alleged injury was of the character of that in question. The girl was sick and bedfast when the plaintiff was called to see her. After waiting on her two or three days he failed to relieve her. He was dismissed and another employed. His successor, after a week's effort, also failed to relieve her. For this, it is alleged the defendant claimed from the plaintiff a much larger sum, and obtained, by way of compromise, five hundred and fifty dollars, secured by mortgage on plaintiff's homestead. Even the injury, as claimed by the defendant or his medical witness, bears no just or equitable relation to the term

McDonald v. Early.

of the compromise, not to mention the amount said to have been claimed as compensation. A considerable portion of the testimony on the part of the defendant was, as we view it, quite inadmissible for any other purpose than to establish the reasonableness and justice of the defendant's claim for compensation for the injuries to the girl, and we think that it fell far short of answering that purpose.

The decree of the district court is reversed, and a decree will be entered in this court restoring the injunction and making it perpetual and canceling the note and mortgage.

DECREE ACCORDINGLY.

MAXWELL, J., concurred.

LAKE, CH. J., dissented, on the ground that the evidence shows a good consideration for the note and mortgage.

JAMES McDONALD ET AL., APPELLEES, V. JOHN W.
EARLY, APPELLANT.

15	63
15	184
15	63
41	274
15	63
47	798

1. **Action Quia Timet.** An action under section 57 of chap. 73, Compiled Statutes, may be maintained where the plaintiff's title to the lands in question is derived from the state, under the provisions of the statute providing for the sale and leasing of the educational lands of the state, by lease.
2. ———: **PLEADING.** A petition under said section should state facts, showing the character, nature, extent, and invalidity of the defendant's claim which constitutes the cloud upon the plaintiff's title to the lands in question.

APPEAL from the district court for Platte county. Heard below before GEORGE W. POST, J.

M. Whitmoyer, for appellant.

1. Action cannot be maintained except by those holding a legal title to the land. Sec. 57, Comp. Stat., 394 *The State v. S. C. & P. R. R.*, 7 Neb., 376.

2. A lease for a term of years, or even an equitable title, is not sufficient to entitle a party to relief in an action to quiet title. *Thomas v. White et al.*, 2 O. S., 551.

3. The petition should state facts showing the nature and invalidity of defendant's claim which constitutes a cloud upon plaintiffs' title to the land in question. If plaintiffs have anything to fear as a cloud, they should set out just what it is fully, or state the reasons why they cannot. *Walls v. Grosvenner*, 31 Wis., 681. *Page v. Kernan*, 33 Wis., 320. *Jenks v. Hathaway*, 48 Mich., 536.

M'Allister Brothers, for appellee.

1. A tenant in possession can maintain an action to quiet his title. *Craft v. Merrill*, 14 N. Y., 456. *Launsbury v. Purdy*, 18 N. Y., 515. *Parlus v. Pacific G. & S. M. Co.*, 35 Cal., 30. The Ohio statute under which the case of *Thomas v. White et al.*, cited by appellant, 2 O. S., 551, was decided, was different from our statute on that subject, and the case of *State v. S. C. & P. R'y Co.*, 7 Neb., 376, does not support the position of counsel; and especially would a lessee from the state be entitled to maintain this action. The state does not undertake to warrant and defend the title to its lessees, nor would it be policy for it to do so.

2. That the plaintiffs' petition is sufficient in its allegations as to the nature and extent of defendant's claim of right to the premises, see 2 Nash's Pleading and Practice, 1218. *Estee's Pleading and Forms*, 2d edition, 180-187. The allegation in the petition that the defendant has no right, title, or interest in the premises mentioned, is equivalent to an allegation that the nature of his title, if he has any, is unknown to the plaintiffs.

COBB, J.

This is an action in the nature of an action *quia timet*, brought by the plaintiffs to remove a cloud from the title of their decedent to certain lands held by a leasehold estate under the state. The petition, after setting out the estate of the decedent in the lands, his possession thereof at the time of death, and their appointment as his administrators, and the possession of the premises by the plaintiffs since the death of their decedent, proceeds as follows:

"8. That said defendant, John W. Early, claims an estate, or interest in and to said " (describing the land) "adverse to the plaintiffs.

"9. The claim of said defendant is without shadow of right, and that the defendant has no title or interest whatever in said land or premises or any part thereof," with prayer for judgment, etc.

To this petition the defendant filed a general demurrer, which being overruled by the district court, the defendant refusing to further plead, a judgment was rendered for the plaintiffs, and the defendant brings the cause to this court by appeal.

The appellant makes two points why his demurrer should have been sustained.

1. The action cannot be maintained except by those holding a *legal title* to the land. A lease for a term of years, or even an equitable title, is not sufficient, etc.

2. The petition should state facts showing the nature and invalidity of the defendant's claim which constitutes a cloud upon the plaintiffs' title to the land in question, etc.

The provisions of the statute applicable to such cases are found in Comp. Stat., chap. 73, §§ 57-61, in the following words:

SEC. 57. That an action may be brought and prosecuted to a final decree, judgment, or order by any person or persons, whether in actual possession or not, claiming title to real

McDonald v. Early.

estate against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate.

SEC. 59. Any person or persons having an interest in remainder or reversion in real estate, shall be entitled to all the rights and benefits of this act.

The object which the legislature had in passing the above provisions was to extend the benefit of the common law in actions of this character to persons claiming title to real property, though not in the possession thereof. Certainly that is all that was accomplished by the legislation, as a party in actual possession had the same rights before as after the passage of the statute.

The distinguishing feature of this action at common law is, that it may be prosecuted in anticipation of injury or loss, and before any has been sustained or even threatened. All that seems to have anciently been necessary was, that the plaintiff be possessed of or entitled to an estate, and the defendant was also possessed of the semblance of a right or title to the same estate, which, though imperfect and invalid as against the rights of the plaintiff, yet might, by the lapse of time, the death of living witnesses, the loss or removal of muniments of title, become the prevailing title. This estate need not necessarily be one of realty, but may consist of personal property of any description. See Story's Equity Jur., §§ 82-5, *et. seq.*

It may be asked, why then the necessity of legislation if at common law this remedy was so full and general? The answer is, that at common law, when out of possession of real property to which one had a right, he usually had an action at law against some person as his ejector or who kept him out of the possession thereof, by which action his title could be settled and adjudicated, and he let into possession. So, having an adequate remedy at law, there was no ground for the interference of a court of equity; for it

is an elementary principle that one can resort to a court of equity only when has no full and adequate remedy at law.

In the case of *Thomas v. White*, 2 Ohio State, 540, the court say: "For he" the plaintiff "must have both legal title and possession to maintain a bill *quia timet*." No authorities are cited, nor reason given; and, after a careful study of the case, I come to the conclusion that the learned judge who wrote the opinion used the word "title" in a sense different from that urged by appellants in the case at bar in their brief.

A leasehold estate, running for twenty-five years in a valuable piece of property, may be of vastly greater value than a fee simple title to another piece. Besides, as we have already seen, the remedy at common law is not confined to real property at all, and the statute is an enlarging rather than a restricting one.

A vast amount of valuable lands belonging to one of the most sacred trust funds of the state, is now held by citizen s under leases like the one copied in the petition in the case at bar. The method of obtaining these leases, as well as the payments and other duties necessary to keep them alive, are quite complicated. It is, therefore, not improbable that many cases of conflicting claims under such leases may arise, involving important property rights. Of such character is probably the case at bar. No doubt, while the facts are of comparatively recent occurrence, all such conflicting claims may be settled upon terms of justice and equity, but which might be impossible after the lapse of considerable time; and to such purpose I regard the remedy by petition in the nature of a bill *quia timet*, as quite appropriate.

Upon the second point, I have come to the conclusion that it is well taken. In this kind of action the plaintiff is said to file his bill *quia timet*—because he fears. Now what does he fear? Certainly not the empty boast of the defendant that he has a right to the lands in question; but, as we have seen above, there must exist something bearing

the semblance of a right in the defendant which he fears may, unless litigated and settled now, grow into and become a title dangerous to that of the plaintiff. This action is often spoken of, both in the books and out of them, as an action to remove a cloud from the plaintiff's title, etc. Now, the existence of this cloud is the cause of action. The statute, in part quoted above, also provides as follows:

"SEC. 58. All such pleadings and proofs and subsequent proceedings shall be had in such action * * * as may be necessary to fully settle and determine the question of title between the parties to such real estate, and to decree the title to the same * * * ." Now it may well be asked, how is the title to be settled and determined? How is the court to decree a certain simulated or pretended title to be no title, and order it to be cancelled or perpetually enjoined unless it is described in the pleadings? It is no answer to say that the defendant should set forth the nature, character, and extent of his title in his answer. He may not answer as in this case when any decree that the court might render would be ineffectual for the purpose intended. Under the old system of chancery practice, a defendant might in some cases be compelled to answer, but not so under the code system. Here the plaintiff must state his case and his whole case. It will not do for him to set up a skeleton and depend upon its being filled out and habilitated by the answer of the defendant.

I am accordingly of the opinion that the demurrer should have been sustained, in which case the petition would doubtless have been amended by setting out the nature, character, and extent of the pretended title of the defendant, which *they fear* may, by the lapse of time or other circumstances, ripen into a title dangerous to their rights. The decree of the district court is therefore reversed, and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

A.L. the judges concur.

THE BURLINGTON & MISSOURI RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR, v. REUBEN F. ARMS, DEFENDANT IN ERROR.

Railroads: LIABILITY FOR NON-DELIVERY OF GOODS. Certain household goods were carried by a railway company to H., in this state, reaching that point on November 14, 1879, and were placed in the company's depot. Soon afterwards the owner called for the goods, but was informed by the agent that they had not arrived. Certain friends of the owner, at his request, also, on the 19th, 20th, and about the 22d of that month, made a similar inquiry of the agent and were informed that the goods had not been received. The depot was burned November 24, 1879, and the goods destroyed. The custom of the railway company was to give notice through the mail to all persons who were not regular shippers of the arrival of their goods, but no such notice was sent to the consignee in this case. *Held*, That the railway company was liable for the value of the goods.

ERROR to the district court for Adams county. Tried below before GASLIN, J.

Marquett, Deweese & Hall, for plaintiff in error.

Plaintiff in error was not liable as a common carrier, but only as a warehouseman. *Hutchinson on Carriers*, 109, 310. *Germania Ins. Co. v. Railroad*, 72 New York, 92. Liability of plaintiff in error ceased when freight was removed from cars and placed in warehouse. *Francis v. Dubuque & Sioux City R. R.*, 25 Ia., 60. Story on Bailments, sec. 448. *Thomas v. B. & P. Co.*, 10 Metc., 472. *Platte v. Hibbard*, 7 Cow., 497. *Roberts v. Turner*, 12 Johns., 232. Notice to consignee not necessary. 2 Redfield on Railways, 52. *Angle v. R. R.*, 18 Iowa, 560.

Tanner & Capps, for defendant in error, cited: *L., L. & Y. R. R. v. Maris*, 16 Kan., 333. Wharton on Negligence, § 571, note. *Wood v. Crocker*, 18 Wis., 345. *Moses v.*

Railroad, 32 New Hamp., 523. *Rome R. R. v. Sullivan*, 14 Ga., 277. 2 Wait's Actions and Defenses, 50. 2 Parsons on Contracts, 194. 2 Redfield on Railroads, 77. Hutchinson on Carriers, 298 and 301.

MAXWELL, J.

The defendant in error brought an action in the district court of Adams county to recover the value of certain household goods shipped by him from Allenton, Iowa, to Hastings, in this state, which were destroyed by fire in the depot at the latter place on the night of November 24, 1879. The railroad company, in its answer, states that the goods arrived at Hastings on the fifteenth of November, 1879, and that Arms was immediately notified by letter through the post-office at Hastings of such arrival, and that on the eighteenth of that month the goods were placed in the warehouse at said station and held by said company as *warehousemen*. On the trial of the cause in the court below a verdict for \$160 was returned, upon which judgment was rendered. The errors assigned in this court relate to the giving and refusing certain instructions which will be considered in their order.

It appears from the testimony that the goods in question arrived at Hastings on the night of November 14th, 1879; that Arms had just removed to this state, and resided about 30 miles from Hastings; that some time after the arrival of the goods, but before their destruction, Arms called at the B. & M. depot in Hastings and inquired for the goods, stating that they needed them very much, and was informed by the agent that no such goods were there; that he then requested the agent to take his address and notify him through the mail of the arrival of the goods; that Arms requested one S. E. Morse, a resident of Hastings, "to watch the depot" at that place and as soon as the goods arrived take them out to him. Morse called at the depot on the nineteenth of that month, and on inquiring for the

goods was informed that they were not there. He inquired again in two or three days thereafter, and received the same answer. One Miller, also at the request of Arms, called at the depot in Hastings, between seven and nine o'clock in the evening of the nineteenth of November, 1879, and inquired for the goods in question, and was informed that they had not been received. He called again on the twentieth and again inquired for the goods, and was told that they were not there. This testimony is not denied even by inference, the agent saying that he does not remember. It also appears from the company's own testimony that its custom was to notify all persons, who were not regular shippers, by mail of the arrival of goods, but fails to show that notice was sent in this case. The railroad company asked the court to give the following instruction, which was refused: "The party who ships goods is bound to take notice of the time, by the usual mode and route of the shipping the same, when they would arrive at the place of destination, and it is the duty of the shipper to apply for his goods within a reasonable time after their arrival and take the same away. Therefore, if the jury find from the evidence that said goods were shipped from Allenton, in Iowa, and that by the ordinary mode of shipping they would have arrived on or about the fourteenth day of November, 1879, and you further find that they did arrive on the fourteenth day of November, 1879, and were then stored in defendant's depot or warehouse, and that plaintiff failed to apply for and get his goods and chattels until after they were burned on the twenty-fourth of November, you will find that the defendant is not to blame for not delivering up said goods to plaintiff, and the mere fact that he sent one Miller and one Morse to inquire whether the goods were there or not will make no difference, unless he had authorized one or both to pay the charges on the same and receive the goods in question."

The refusal to give this instruction is now assigned for

error. It is sufficient to say that the instruction asked is not applicable to the testimony. The plaintiff below required the goods, as he states in his testimony, "very badly," being necessary household goods, and by himself or agents made inquiries almost daily between the time of the arrival of the goods at Hastings and their destruction by fire, and received the invariable answer by those in charge of the depot that the goods were not there. There was therefore no question as to the failure of Arms to apply for the goods to submit to the jury. And even if Morse and Miller did not have the money or propose to pay the charges on the goods and take them away—of which there is no testimony—still it was the duty of the agent to state to them in answer to their inquiries the facts in regard to the goods being then at the depot. There is no error therefore in the refusal to give the instruction.

The court also refused to give the 4th instruction asked for by the railroad company, which is as follows: "The following is a part of the contract introduced in evidence by the plaintiff in this case, to-wit: 'All articles of freight arriving at their destination must be taken away in 24 hours after being unloaded from the cars, the company reserving the right of placing the same in store at the risk and expense of the owner if they see fit after the lapse of that time.' If the jury find from the evidence that the goods did arrive at their place of destination on or about the 14th of November, 1879, or even as late as the 20th of said month, and if you further find that they were not taken away by the plaintiff or some one for him within 24 hours after being so unloaded, then you will find that they were according to said contract held at the risk of the plaintiff, and if they were destroyed the loss would be the loss of the plaintiff and not the loss of the defendant; and the defendant would not be liable."

It was proposed by this instruction to submit to the jury a number of questions having no pertinency to the

question at issue. The testimony shows that the custom of the agents of the plaintiff in error at Hastings was to notify through the mail all persons who were not regular shippers of the arrival of their goods. The proof fails to show that any such notice was sent to Arms, and he was unable by persistent inquiry by himself and agents to ascertain that the goods had arrived. Such being the condition of the testimony, it would seem like a burlesque to instruct the jury in effect that he must lose the goods because he failed to take them away—goods that had been received ten days before their destruction and were in the custody of the agents, but which they persistently denied the receipt of. The liability of the railway company continued until the notice had been given and a reasonable time had intervened to permit of their removal. There was no error therefore in refusing to give the instruction.

No particular objection has been pointed out to the instructions given by the court on its own motion, and they seem to have been quite favorable to the plaintiff in error. The verdict is fully supported by the evidence, is right, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JOSIAH ROOP, PLAINTIFF IN ERROR, V. NATHANIEL
HERRON, DEFENDANT IN ERROR.

- Partnership: INSOLVENCY: INDIVIDUAL CREDITOR OF ONE PARTNER.** When a firm is insolvent the partnership property will be applied to the payment of the partnership debts; and an individual creditor of one of the partners is not entitled to be paid out of such property in preference to partnership creditors.

15	73
17	490
18	483
18	573
20	54
22	581
22	748
22	749
15	73
27	141
15	73
42	669
15	73
44	43
44	117
15	73
49	150

2. ———: ———: TRANSFER BY ONE PARTNER TO CO-PARTNERS.

A transfer of the interest of a partner of an insolvent firm to his co-partner does not enable the assignee as against the creditors of the firm to apply the partnership property to the payment of his individual debts.

ERROR to the district court of Gage county. Tried below before WEAVER, J. The opinion states the case,

J. E. Bush, for plaintiff in error.

1. Partnership property is liable for partnership debts before a dissolution of partnership, but after a dissolution of the partnership and a transfer of the property by the firm, either to a co-partner or to any other person, the creditors of the partnership lose that lien the law gives them upon a partnership property. *Wilson v. Kellogg*, 11 Ohio, 394. *Smith v. Howard*, 20 Howard's Pr. Rep., 121. *Hapsgood v. Cromwell et al.*, 48 Ill., 64.

2. When a *bona fide* sale is made of the property of a firm by the members, before any proceedings either in law or equity are instituted by the creditors of the firm, such creditors cannot by any subsequent proceedings acquire a lien upon the property when disposed of. *Gwin v. Selby*, 5 Ohio State, 97.

3. As the ordinary creditors of an individual have no lien on his property and cannot prevent him from disposing of it as he pleases, so the ordinary creditors of a firm have no lien on the property of the firm so as to be able to prevent it from parting with that property to whomsoever it chose. 2 Lindley on Part., 654, and cases cited.

4. A transfer by a firm to one partner *bona fide* and by him to a third person in a like manner for a valuable consideration passes both the legal and the equitable title to the property against the creditors of the firm. *Belknap v. Cram*, 11 Ohio, 412.

5. When one of two partners retires from business, re-

linquishing to the other all his interest in the partnership property, the remaining partner acquires the same dominion as if it had ever been his own separate property. *Smith v. Howard*, 20 How. Pr., 121. Story on Part., § 358. *Hollis v. Staley*, 59 Tenn., 167.

L. M. Pemberton, for defendant in error.

1. The *insolvency* of the partnership changes the rule contended for by plaintiff. *Till's Case*, 3 Neb., 261. *Phelps v. McNeely*, 66 Mo., 554; S. C. 27. Am. Rep., 378. *Tenny v. Johnson*, 43 N. H., 144. *Deveau v. Fowler*, 2 Paige, 400. *Topliff v. Vail*, Harrington Ch. (Mich.), 340. *Menash v. Whitewell*, 52 N. Y., 146. *Conroy v. Woods*, 13 Cal., 626. *In re Cook*, 3 Biss., 122. *Ransom v. Van Deventer*, 41 Barb., 307. *Black v. Bush*, 7 B. Mon., 210. *Collins v. Hood*, 4 McLean, 186. *Hubbard v. Curtis*, 8 Iowa, 1.

2. All debts due from the joint fund must first be discharged before any partner can appropriate any part of it to his own use, or to pay any of his private debts, and a creditor of one of the partners cannot claim any interest but such as belongs to his debtor, *whether his claim be founded on a contract with a debtor, or on a seizure of the goods on execution or attachment*. 2 Lindley on Part., 1055, note 2, and cases there cited. Pars. on Part., 353. *Bowen v. Billings*, 13 Neb., 443. In case at bar, the firm being insolvent, Jones had no interest in the firm property that he could turn over to pay his private debts.

MAXWELL, J.

This is an action of replevin brought by the plaintiff against the defendant to recover certain goods levied upon by the defendant, as sheriff, under an order of attachment. On the trial of the cause the court found in favor of the

defendant. This cause is submitted upon the following stipulation: "It is hereby stipulated and agreed between the parties to this action that the following is a true statement of the facts:

"1st. That from January, 1882, John P. H. Jones and Omar DeLand were partners, doing business at Blue Springs, Gage county, Nebraska, under the firm name of Jones & DeLand.

"2d. That on the 25th day of March, 1882, said partnership of Jones & DeLand was dissolved by mutual consent, notice by publication in the Blue Springs Motor of said dissolution was given. Said Omar DeLand retired from said firm, and said John P. H. Jones continued the business in his own name, and kept all the goods belonging to said firm and agreed with the said DeLand to pay all the debts contracted by said firm.

"3d. At the time of dissolution of said firm of Jones & DeLand, and at the time of contracting the debts to and buying the goods of King Bros. & Co., and borrowing the \$250 from plaintiff as hereinafter stated, said firm of Jones & DeLand was insolvent.

"4th. All the goods and property claimed by plaintiff in this action were purchased by said firm of Jones & DeLand in January, February, and March, 1882, from said King Bros. & Co., of Chicago, Ill., and from other creditors, and none of said goods have been paid for, and that they are all a part of the partnership goods received by said Jones from said firm of Jones & DeLand at the dissolution of said firm, and all of said goods were obtained from said King Bros. & Co., who were induced to sell said goods to said Jones & DeLand through fraudulent representations as to the amount of property owned by said firm of Jones & DeLand, and said false representations were made by said Jones for the purpose of obtaining said goods now claimed by plaintiff in this action, but this plaintiff knew nothing about said fraudulent representation.

"5th. The goods claimed by plaintiff in this action are held by the defendant, who is sheriff of said county, under and by virtue of an order of attachment issued out of the district court of Gage county, Nebraska, and levied by said defendant sheriff on said goods, at the suit of King Bros. & Co., which suit is brought in the individual names of members of said firm against John P. H. Jones and Omar DeLand, and all the property claimed by plaintiff except the tea, tea caddies, and the boots were purchased on or about March 1st, 1882, by said firm of Jones & DeLand from said firm of King Bros. & Co., and firm of Jones & DeLand is indebted to said firm of King Bros. & Co. in the sum of \$801 for goods purchased by them of the said firm of King Bros. & Co. on or about March 1st, 1882, to obtain pay for which said attachment suit is brought.

"6th. Said John P. H. Jones, during the continuance of the partnership of said Jones & DeLand, to-wit, in the month of February, 1882, borrowed \$250 from plaintiff, who took the individual note of said Jones for said debt. Said money was not used for the benefit of said firm of Jones & DeLand, but for the sole benefit of said Jones.

"7th. On or about the 4th day of April, 1882, after one of the creditors of said firm of Jones & DeLand had, with the plaintiff's knowledge and consent, taken possession of the goods sold by them to said firm of Jones & DeLand, in satisfaction of the purchase price of said goods, said John P. H. Jones, successor of said firm of Jones & DeLand, delivered to plaintiff in this action the goods claimed by plaintiff herein before they were attached by defendant sheriff at the suit of King Bros. & Co. in full settlement of plaintiff's claim of \$250, and said plaintiff has no list of said property except that copied by him from officer's return in said suit.

"8th. The property so delivered to plaintiff by said John P. H. Jones, and herein claimed by plaintiff, is worth \$493.95, invoiced at the cost price of said goods, without

Roop v. Herron.

cost of carriage, and plaintiff herein, at the time said goods were delivered to him by said John P. H. Jones, knew that said goods formerly belonged to said firm of Jones & De Land, and that said firm, and each of the members thereof, was insolvent. That some of the grounds for attachment alleged in the affidavit on which said order of attachment issued are true."

It will be seen from the admitted facts that Roop received this partnership property to the amount of nearly twice his claim, he at the time knowing it to be partnership property, and that the firm was insolvent. He was not therefore a bona fide purchaser.

The question here presented was before the court in *Till's Case*, 3 Neb., 261. In that case a firm doing business as William Till & Co. dissolved partnership and divided the assets of the firm among the members thereof, and then claimed the property as exempt under the exemption law. The present chief justice, speaking for the court, says (pages 262-3): "But suppose it were shown satisfactorily that the partnership had terminated by the agreement of the parties, and nothing more, still the relator would not be entitled to hold this property released from the lien of his co-partner for the satisfaction of their joint debts. To give him this right, he is required to show that such was their agreement, and that it was made *bona fide*. If nought but a bare dissolution be shown, it will be presumed that the assets of the firm are held by the member thereof, in whose possession they may be found clothed with a trust for his former associates to apply the same in satisfaction of the demands of their joint creditors. *Ex Parte Williams*, 11 Ves., 3. Story on Partnership, §§ 360, 361." And in *Bowen v. Billings*, 13 Neb., 439, it was held that in case of insolvency of the firm, partnership debts are to be paid out of the joint fund before any portion of it can be applied to other purposes. Kent says: "The joint creditors have the primary

claim upon the joint fund, in the distribution of the assets of bankrupt or insolvent partners, and the partnership debts are to be settled before any division of the funds takes place. So far as the partnership property has been acquired by means of partnership debts, those debts have in equity a priority of claim to be discharged; and the separate creditors are only entitled in equity to seek payment from the surplus of the joint fund after satisfaction of the joint debts." 3 Kent Com., 64.

This principle is recognized in cases where an execution for the separate debt of one of the partners is levied upon the partnership property. In such case the judgment creditor cannot levy upon the moiety or undivided share of the judgment debtor in the property, as if there were no partnership debts; but his levy is restricted to the interest of the judgment debtor therein after the adjustment of the partnership debts." *Hankey v. Garrett*, 1 Ves., 239. *Barker v. Goodair*, 11 Id., 85. *Muir v. Leitch*, 7 Barb., 341. *Deal v. Bogue*, 20 Penn. State, 228. Story's Eq. Juris., § 677.

A purchaser under the execution acquires no right to the joint property so as to entitle him to take it from the other partners. He merely takes the interest of the judgment debtor which on a settlement shall be found to exist. *Nixon v. Nash*, 12 Ohio State, 647. Story's Eq. Juris., § 677, and cases cited.

In the case cited from Ohio it is said (page 650): "Each partner holds his interest in the joint property subject to a trust for the partnership creditors and the claims of his several co-partners; so that the beneficial interest of each is his residuary share after the partnership accounts are settled, and their rights *inter sese* adjusted."

The uniform current of authority in this country is in consonance with these decisions. If, therefore, in a sale upon an execution against an individual partner only his interest in the partnership property after the settlement of

the partnership accounts can be sold, because the debtor possesses no greater interest therein, can a partner of an insolvent firm divest partnership property of its distinctive character by simply assigning his interest in the firm to his co-partner? A partnership is a distinct entity, having its own property, debts, and credits. For the purposes for which it was created it is a person, and as such is recognized by the law. And the credit being given to the firm—in effect to the partners jointly, it would seem but justice that the goods so purchased should not be diverted to the use of an individual partner, when such diversions will have the effect to defraud the creditors of the firm. It may be said the goods having been sold to the firm the creditors thereby surrendered all control over them and trusted alone to the solvency of the debtor firm for payment; that the delivery being complete and without conditions, the debtor firm could make what disposition of the property it saw fit. In a sale to an individual upon credit, in addition to the agreement to pay the debt, there is an implied agreement that the debtor's property shall, if necessary, be applied for that purpose. Now, if the debtor attempts to divert his property from this purpose—to place it beyond the reach of his creditors—the law at once authorizes its seizure by attachment to prevent the creditor from being defrauded. So, with property held by a firm, there is an implied agreement that all its assets shall, if necessary, be applied to the payment of the firm debts, and any diversion of such assets of an insolvent firm is a fraud upon its creditors. In other words, the partnership property is a trust fund to the extent of the partnership liabilities, and to be applied in satisfaction of the same. *Egbert v. Woods*, 3 Paige Ch., 517. *Innes v. Lansing*, 7 Id., 588. *Whitewright v. Stimpson*, 2 Barb., 379. This being so, can the members of an insolvent firm by simply assigning their interest in the property defeat this trust and change the character of the property from partnership

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to that of an individual? If so, it affords an easy mode of defeating partnership creditors. The creditors might say, we gave the credit because the firm seemed to possess sufficient assets to pay its debts and if in good faith they are applied to that purpose they are sufficient. The right of the members of a firm, who as a firm have induced others to give them credit, to change the firm property to that of an individual member of the firm, without the consent of creditors, is very doubtful. In this case the partnership was insolvent, as the plaintiff well knew, yet he obtained nearly twice the amount of his claim in partnership goods. He was in no sense an innocent purchaser and is not entitled to protection as against the creditors of the firm. And even if the retiring member of the firm could defeat the creditors by giving his consent thereto, still no such consent is shown. The case is similar therefore to *Till's, supra*—that where nothing is shown but a transfer of the property to a partner, the presumption is that he holds it in trust for the creditors. There is no error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

**TAYLOR JONES, PLAINTIFF IN ERROR, V. THE CHURCH
OF THE HOLY TRINITY, DEFENDANT IN ERROR.**

15	81
153	381

1. **Justice of the Peace: JURISDICTION.** While the law requires a justice of the peace to exercise the functions of his office in the precinct for which he is elected or appointed, yet having jurisdiction co-extensive with the limits of the county, a judgment rendered by him in any other precinct thereof, is not void on that account.

2. **Mechanic's Lien: GARNISHMENT: PRIORITY.** The right of a material man under the mechanic's lien law to money going to a contractor is superior to that of an ordinary creditor under proceedings in garnishment.

ERROR to the district court of Lancaster county, POUND, J., presiding.

S. J. Tuttle, for plaintiff in error.

Payment to Hoagland Brothers was wrongful, because they had no claim under the mechanic's lien law. The money was owing to plaintiff alone. In no event could they lay claim under the law in question to any lien on defendant's in error property, or upon funds in its hands owing the plaintiff in error, certainly not upon so much of said funds as has been ordered paid over by precedent authority. *Copeland v. Manton*, 22 Ohio State, 398. *M' Culom v. Richardson*, 2 Handy, 275. On question of validity of justice's judgment cited: *Phillips v. Thralls*, 26 Kan., 780. Freeman on Judgments, 119. *Case v. State*, 5 Ind., 1. *State v. Alling*, 12 Ohio, 16. *Blackburn v. State*, 3 Head, 690. *Pepin v. Lachenmeyer*, 45 N. Y., 27.

J. S. Hoagland and *M. H. Sessions*, for defendant in error, on validity of judgment, cited: *State v. Shropshire*, 4 Neb., 411. *Foster v. M' Adams*, 9 Tex., 542. *The People v. Evans*, 18 Ill., 361. *Homes v. Fihlenburg*, 54 Ill., 203. *Durfee v. Grinell*, 69 Ill., 371. *Keutzler v. R. R. Co.*, 47 Wis., 641. *Bigelow v. Stearns*, 19 Johns., 39. *Reynolds v. Orvis*, 7 Cow., 269.

LAKE, CH. J.

The errors complained of are predicated on the conclusions of law found by a referee to whom the case in the court below was sent for trial, and whose report was confirmed.

The facts found by the referee were not excepted to. These, in so far as they bear on the questions presented for our decision, are, substantially:

1st. That on the 17th of May, 1880, the plaintiff made a contract with the defendant to furnish the materials and do the work in the enlargement of its church building in Lincoln, which he did by himself and sub-contractors, of whom J. Searing was one.

2d. That the defendant, on the completion of the work, settled with the plaintiff and paid him in full therefor with the exception of the sum of \$46.17, which is here in controversy.

3d. That in the performance of said contract the sub-contractor, Searing, procured from the firm of Hoagland Brothers certain materials, amounting in value to the above-mentioned sum.

4th. That on the 10th of August, 1880, at about the hour of noon, Hoagland Brothers served on the defendant a copy of their account for the materials so furnished to Searing, together with a written notice that they claimed a lien for its payment on said building. They also at the same time gave a similar notice to the plaintiff.

5th. That on the 9th of August, 1880, the firm of Doolittle, Gordon & Co., recovered a judgment before A. C. Platt, a justice of the peace, against said Searing for the sum of twenty-seven dollars and costs. That afterwards such proceedings were had under said judgment that the plaintiff, as garnishee, was ordered to pay the amount thereof, on his admission that he was then owing Searing fifty dollars on account of his work as such sub-contractor. This order was made a few hours before Hoagland Brothers served their notice of lien on the defendant.

6th. That the justice of the peace who rendered the judgment in favor of Doolittle, Gordon & Co., and who made the order in garnishment, acted in these matters outside of the precinct in which he was appointed to hold his office, although within the county of his jurisdiction.

7th. That the defendant had, in pursuance of the demand of Hoagland Brothers, paid over to them the full amount of their account, which had been retained in the settlement with the plaintiff.

Under these facts the referee found as his conclusions of law, 1st, that the justice of the peace, having acted in Midland precinct, whereas he was an officer of Capitol precinct, his judgment and order in question were void. 2nd, that the defendant was authorized to pay the account of Hoagland Brothers, and charge the plaintiff therewith. 3d, that the defendant should have judgment in its favor.

As to the first conclusion of law, we think the referee and court below were in error. The justice of the peace, although appointed for Capitol precinct, where he ought to have held his office, had jurisdiction co-extensive with the limits of Lancaster county, which necessarily covered Midland precinct, and but for the policy of the law respecting the convenience of suitors, witnesses, and others having business with him, could doubtless perform his official duties anywhere therein. The holding of his office or place of business within the particular precinct for which the justice is elected or appointed, so long as he keeps within the county, is not a matter respecting his jurisdiction, but one of policy and convenience merely, which those interested therein may disregard. If the jurisdiction of a justice of the peace were confined to the particular precinct for which he is elected, it would doubtless be otherwise.

In the case of *State, ex. rel. Ferguson, v. Shropshire*, 4 Neb., 411, where this court required the defendant, who was a justice of the peace, to remove his office to the ward in the city of Omaha in which he was elected, it is said that "It is not a question as to the jurisdiction of a justice of the peace, but one in regard to the *situs* of his office, or his duty in respect to the place where he shall hold his office and exercise its functions."

The constitution of this state, Art. VI., § 20, requires

justices of the peace to reside in the particular "precinct for which they are elected or appointed." And inasmuch as this officer, as is customary, must have some known place in which to exercise the functions of his office, it is doubtless within the purview of the law that it shall be in the precinct where he is required to reside, although his jurisdiction may, as it does, extend greatly beyond it. But, although such is the policy of the law, yet if a justice of the peace, regardless of his duty in this respect, fix his place of business in another precinct of the county, and it is acquiesced in, we have no doubt whatever that his judgments rendered there stand on the same footing, and are equally as valid as if they had been rendered in his own precinct.

But as to the second and third conclusions of law, we think the referee was properly sustained. That the account of Hoagland Brothers against Searing was just, and that the materials therein mentioned were furnished for said building, were conceded. The only objection urged to its payment by the defendant on the plaintiff's account is, that it was not attested as the law required to make it a perfected lien on the building. This, however, under the circumstances of this case, is of no consequence. It is a requirement which the defendant was at liberty to waive, and which the plaintiff could not insist upon it being complied with. If there had been any dispute as to the amount due on the account—if the defendant had retained and paid over to Hoagland Brothers more than was actually due them from Searing for materials furnished for the work in question there would have been force in the objection.

We have not the evidence on which the referee made his findings of fact, but inasmuch as they are conceded to be correct, a further reference to them is unnecessary, and this payment should be sustained as a valid charge against the plaintiff. The referee in his report says: "That plaintiff

consented that defendant should retain the said \$46.17 from the moneys due to him, and that to said sum he made no claim for himself except that the money should go either to Doolittle, Gordon & Co. or to Hoagland Brothers, the one whose legal right thereto was strongest." Clearly the right of Hoagland Brothers was the stronger, for theirs antedated that of Doolittle, Gordon & Co. by some days. The materials in question were furnished at various times between June 20th and August 8th, and were a lien on the money going to the plaintiff for his work from the time they were obtained, while the lien under the garnishment attached, as before shown, on the 9th of August, 1880.

Notwithstanding the error respecting the jurisdiction of the justice of the peace, the judgment on the merits of the case being conformable to our views of the law, must be affirmed.

JUDGMENT AFFIRMED.

ALL the judges concurred. Motion for rehearing of the cause was overruled.

BENJAMIN F. COBB, PLAINTIFF IN ERROR, V. THE CITY OF LINCOLN, DEFENDANT IN ERROR.

Cities of the Second Class: FEES OF POLICE JUDGES. Cities of the second class are not liable for the fees of police judges where, for non-payment thereof, violators of city ordinances are required to work, as provided in Sec. 31 of the act incorporating such cities.

ERROR to the district court for Lancaster county. Heard below before POUND, J.

R. D. Stearns, for plaintiff in error.

A. C. Ricketts, for defendant in error.

LAKE, CH. J.

This is a petition in error from Lancaster county. The ruling complained of was in the sustaining of a general demurrer to the petition. The question thus presented is, simply, whether there is any liability on the part of the city to the police judge, for fees adjudged by him against violators of city ordinances, which he is unable to collect from them in money in these cases where, for non-payment thereof, they are required to work, as provided in sec. 31 of the act incorporating cities of the second class, Comp. Statutes, chap. 14. One of the provisions of this section is, that whenever a defendant is committed "for the non-payment of a fine or costs for the violation of any ordinance, he shall also be put to work for the benefit of the city, and shall be credited on such fine and costs \$1.50 per day, for each day he shall work."

The only other provision of statute bearing directly upon this subject is sec. 8 of the same act, which provides that, "The police judge shall receive the same fees as justices of the peace for similar services."

It is urged by counsel that this provision, especially when taken in connection with the one first quoted, imports not only that the *measure* of this officer's compensation is the same as that provided for justices of the peace, but also that he shall in all cases *receive it*, if not from persons adjudged to pay it, then from the city whose officer he is.

But we cannot adopt this as a proper construction of the section. It seems to us, that if the design of the legislature had been to impose such costs upon cities, against their will, it would have been expressed in unmistakable language. The terms here employed, under the accepted rule of construction that the words of a statute must be given their ordinary meaning, where it is not clear that a different one was intended, have no such meaning. They convey no

such intention. "The police judge shall receive the *same* fees," etc. As ordinarily understood, the word "same," when used as it is here, in comparison, means, "Of like kind, species, sort, dimensions, or the like; not differing in character, or in the quality or qualities compared; corresponding; not discordant; similar; like."—Webster. As here used, it has special reference to the amount of compensation to be charged and paid for particular services, and not to the source from whence it should come.

And sec. 31, instead of supporting the claim of the plaintiff, rather tends to confirm the view that these judges must look alone to defendants for the costs which they are adjudged to pay, for if they fail to pay them in money, and are compelled to discharge them by labor, it shall be "for the benefit of the city," and not for that of the judges.

Both fines and costs imposed upon offenders, for compelling payment of which, in money, when the parties can make it, efficient means are provided, are designed simply for their punishment. So, too, are the imprisonment and labor which the law requires in lieu thereof. This enforced labor was not designed as a source of revenue or profit merely to the city, nor as a means of raising the funds necessary for the payment of the fine to the school fund, and the costs to those entitled to them, but to prevent impecunious offenders from escaping punishment altogether.

The credit of one dollar and fifty cents per day, given to the delinquent upon the judgment, has no particular reference to the real value of his labor, for that may be considerably above or below that amount, depending, as it must, upon such a variety of attendant circumstances. Indeed, it may, we think, be safely asserted, that such labor is practically of but very little, if any real benefit to the city, beyond the expense of keeping the prisoner while performing it. The credit was intended simply to graduate the punishment, in all cases alike, that must follow the non-payment, in whole or in part, of the adjudged fine and costs.

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We discover no intention on the part of the legislature to require payment by cities for this sort of labor.

JUDGMENT AFFIRMED.

THE other judges concur.

L. F. LEWIS ET AL., PLAINTIFFS IN ERROR, V. THE STATE
OF NEBRASKA, DEFENDANT IN ERROR.

1. **Criminal Practice:** INFORMATION. A magistrate has no right to alter an information, in any material part of it, without the consent of the person who made it. And, if made with his consent, it should be re-verified before any further step is taken under it.
2. ———: ———. But if such alteration be made, as in changing the value of property alleged to have been stolen so as to reduce the offense from grand to petit larceny, without a re-verification, and the accused go to trial without objecting to the information for that reason, the judgment, whether of acquittal or conviction, is good.

ERROR to the district court for Washington county.
Heard below before SAVAGE, J., May 19, 1881.

J. Wesley Tucker, for plaintiff in error.

Consent cannot confer jurisdiction, nor convert that into an information which is not in law. *Doyle v. State*, 17 Ohio, 225. No objection comes too late which discloses the fact that a person has been put to answer a crime in a mode violating his legal constitutional rights. *Id.* Nor can an information be changed, even with consent, so as to make it embrace charges not presented by the prosecuting witness (*People v. Campbell*, 4 Parker, Crim. Rep., 386), nor so as to change it in any material respect. It is error

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to change the averments in an information. *City of Burlington v. James*, 17 Kansas, 221. In a criminal case the warrant is the basis of the right to try the defendant (*Redmond v. State*, 12 Kansas, 174 and 175), and in this case no warrant was ever issued. *State v. Beebe*, 13 Kan., 589.

Isaac Powers, Jr., Attorney General, for the State.

If the record was improperly altered or amended the defendant should have applied to the county court for correction of the same before going to trial on such record, and by not seeking to have such corrections made, the defendants waived the right to afterwards insist that the failure to make such correction, or to have the information re-sworn to, was an irregularity calling for a reversal of the judgment, especially after they have called a jury, permitted proof on behalf of the prosecution in support of the charges in such information to be introduced without objection, and on the part of defendants in denial of such charges, and the case finally submitted to such jury at defendant's instance.

LAKE, CH. J.

The record in this case does not present the question discussed by counsel for the prisoners in his brief. That question is whether a magistrate may lawfully change an information as to the alleged value of the property stolen, from grand to petit larceny, and then, without its being again sworn to, force the accused to go to trial upon it. Clearly, he may not. A magistrate has no right to alter an information in any material part of it without the consent of the person who made it. And even when done with his consent, it should be re-verified before any further step is taken under it. Where an information is found to be defective in any respect a better practice than to change it is to make an entirely new one on which the further prosecution of the case may proceed.

Respecting the change in question, the transcript from the county judge shows that after the accused had been brought before him, and while in lawful custody under a charge of grand larceny, he changed the complaint to one for a "misdemeanor." But it was "not re-sworn to," nor was "any new warrant issued for the re-arrest of the defendants." Thereupon the prisoners, by their attorney, "moved that they be discharged, for the reason that the court has no jurisdiction over the parties." This motion was overruled and an exception taken, and the overruling of it is now assigned for error.

From this it will be observed that the only reason given for the motion was that the court had "no jurisdiction" over the prisoners, and that in overruling it the judge decided simply that he had. In this decision there was no error, for the reason that the prisoners were then in the presence of the magistrate, under a lawful arrest, by virtue of a warrant duly issued charging them with the commission of a criminal offense. And although the complaint on which the warrant issued was changed, as stated, yet no objection being made to it on that account, it will, nevertheless, support a conviction for the offense which it now charges. The failure to object in the first instance must, after trial and judgment, be regarded as an assent to the change, which cannot afterwards be withdrawn. The court certainly had jurisdiction of the accused, for if the result of the trial had been an acquittal instead of a conviction, it could not be successfully contended that the judgment would not have been a complete bar to another prosecution of them for the same larceny.

If, as now appears from the assignments of error and the brief of counsel, the motion to discharge were based on the change in the affidavit, that matter should have been brought to the attention of the magistrate by a particular mention of it as the ground of objection to going to trial upon it. Although it is the undoubted right of one ac-

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cused of crime to insist upon a sworn complaint, yet if he go to trial on one that is not sworn to without objection for that reason, the judgment, whether of acquittal or conviction, is good. The objects of the complaint are: *First*. To furnish the magistrate who is to issue the warrant of arrest with *prima facie* evidence that an offense has been committed, and by whom. *Second*. To inform the accused when arrested, in a responsible manner, of what he is charged, so that he may be prepared to meet it on the trial. *Third*. To guard against unfounded and unjust accusations. And it has been found that these objects are best assured by requiring the complaint to be made under the responsibilities of an oath or affirmation; therefore the law requires it. But if the accused see fit to waive the benefit of the oath, and go to trial on an unverified complaint, it will not affect the result. There is no error in the record of which the prisoners can now be heard to complain, and the judgment of the district court affirming that of the county court must be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

15	92
18	581
15	92
54	14

HENRY W. KUHNS, PLAINTIFF IN ERROR, v. CHARLES BANKES AND JULIUS TREITSCHKE, DEFENDANTS IN ERROR.

1. **Negotiable Instruments.** The indorsement and delivery of a negotiable promissory note secured by mortgage carries with it the security.
2. **Verdict against Evidence.** When a verdict is against the clear weight of evidence it will be set aside.

ERROR to the district court for Douglas county. Tried below before NEVILLE, J. The opinion contains a comprehensive summary of the evidence.

Congdon, Clarkson & Hunt, for plaintiff in error.

1. The petition in the foreclosure suit alleges ownership in Kuhns of the Noyes note and mortgage. This is a mere formal allegation, for the purposes of suit, and an effort was made by Kountze, as appears from his testimony, to have this allegation corrected in accordance with the facts. There is not a particle of testimony which goes to show that the note and mortgage were assigned in payment of the note sued upon, and Bankes is the only witness who swears that such assignment was made in payment of renewal note, and then only in response to a leading question on the re-direct examination. The burden of proof is on the defendants, and the weight of evidence is clearly in favor of plaintiff and against the verdict, and the verdict ought to have been set aside. *Fried v. Remington*, 5 Neb., 525. *Holland v. Griffith*, 13 Id., 472. *Smith v. Evans*, Id., 314. *Dunbar v. Briggs*, Id., 332. *McDougall v. Giacomini*, Id., 431.

2. When, in consequence of a misstatement of the pleadings, an instruction has a tendency to confuse or mislead the jury, it is good ground for a new trial. *Howell & Gibson v. Sewing Machine Co.*, 12 Neb., 177. *Mut. Hail Ins. Co. v. Wilde*, 8 Neb., 431. *Mathewson v. Burr*, 6 Neb., 312.

3. When the jury are misdirected, the presumption is that they were misled, and the verdict is erroneous. *Noyes v. Shepard*, 30 Me., 173. *Thatcher v. Jones*, 31 Me., 528, 534.

4. A wrong instruction is not cured by the subsequent giving of a proper one. *Wasson v. Palmer*, 13 Neb., 376.

E. M. Bartlett, for defendants in error, contended that the assignment of the note and mortgage was a solemn agreement between the parties reduced to writing, that had they been assigned as collateral security the parties would have so stated in the written assignment, and the mortgage and note would have been treated as collateral, which never has been the case. The attempt now to vary a written contract at this late day by parol testimony is contrary to law and the justice of the case. 1 *Greenleaf Evidence*, § 87. Kuhns, through his agent, Kountze, and attorney Hartigan, admit that Kuhns purchased the note and mortgage. Bankes and Treitschke testify the note and mortgage were assigned to Kuhns in payment of the Bankes and Treitschke note. These admissions, repeatedly confirmed by them, have been acted upon by both Bankes and Treitschke, who never derived any benefit from the transaction, and they are protected and the plaintiff is estopped from claiming anything against the defendant. 1 *Greenleaf on Evidence*, § 207. The purchase will be treated as payment according to the agreement. *Poff v. Gallagher*, 3 E. D. Smith, 507. Taking a third person's note in payment of a prior debt fairly is payment. *Edwards on Bills and Notes*, 185. Payment of a note is not necessarily a payment of money, but that is payment which the parties contract shall be accepted as payment. *Hoffman v. Walker*, 26 Gratt., 315. 2 *Daniel on Negotiable Instruments*, § 1221. Checks or notes may be taken as absolute payment for an antecedent debt by an agreement, whether so or not is a question for the jury. 2 *Daniel on Negotiable Instruments*, 636, note. *Edwards on Bills and Notes*, 206 and 207.

MAXWELL, J.

In September, 1879, one Noyes, a resident of Cass county, represented to Bankes that he desired to enter into the

Kuhns v. Bankes.

grain business with parties in Chicago, and required about \$800 to enable him to do so. He thereupon proposed to Bankes to give him his note for \$1600, secured by a mortgage upon his homestead in Cass county as security for the loan. Bankes and Noyes jointly employed an attorney to examine the title to the property and prepare the papers. The title being found to be good, Bankes accepted the proposition. Noyes thereupon took the mortgage prepared by the attorney to Cass county, signed his own name to the same, and forged his wife's name thereon, and that of the justice of the peace to the acknowledgment. He then returned to Omaha and delivered his note for \$1600 and the forged mortgage to Bankes. The original note and mortgage are in the record, and as the question of assignment is a prominent feature in the case, it will be well to copy the note. It is as follows:

"\$1600.00. OMAHA, NEB., August 18th, 1879.

"Ninety days after date, we, or either of us, promise to pay Charles Bankes or order one thousand six hundred dollars, for value received, payable at the Omaha National Bank, Omaha, Nebraska, with interest at ten per cent per annum from date until paid. This note is secured by a mortgage of even date herewith.

"E. NOYES."

This note was indorsed by Bankes, and, with the mortgage, delivered to Herman Kountze as collateral security for the payment of a note for \$800, signed by Bankes and Treitschke, the loan being made by them for Noyes. At this time it is evident that Bankes, Treitschke, the attorney who prepared the mortgage, and Kountze believed the mortgage to be genuine; but soon afterwards the attorney was notified by Noyes himself that the mortgage was a forgery. At the instance of this attorney, an attorney at Plattsmouth was employed to foreclose the mortgage, the object apparently being to test the question of its validity. The action was commenced in the name of Kuhns, who

through Kountze had made the loan; and the Plattsmouth attorney, evidently supposing that the mortgage was genuine, requested Kountze to procure a formal assignment of the same from Bankes and Treitschke. A formal assignment was made by Bankes and Treitschke to Kuhns, as they allege, upon the condition that they were to be released from all liability upon the \$800 note. On the trial of the foreclosure suit, the court found that the mortgage was a forgery and fraudulent and void, but found the note to be genuine and rendered judgment thereon for the sum of \$1946.66 against Noyes. An execution was duly issued on the judgment and returned unsatisfied. An action was thereupon commenced by Kuhns upon the note of Bankes and Treitschke. As a defense to the action they plead that they were released from all liability on the note at the time, and as a consideration for assigning the Noyes mortgage to Kuhns. On the trial of the cause a verdict was returned in favor of the defendants, and judgment rendered thereon. A number of errors are assigned in this court, the principal one being that the verdict is against the weight of evidence.

The testimony shows that the note and mortgage were duly delivered to Kountze as collateral security for the \$800 loan. This was an assignment of them to the extent of the loan and interest thereon. A mortgage of real estate may be assigned orally, by mere delivery for a valuable consideration, and the same rule applies to any chose in action. *Ford v. Stuart*, 19 Johns., 342. *Briggs v. Dorr*, Id., 95. *Dawson v. Coles*, 16 Id., 51. *Runyon v. Merse-reau*, 11 Id., 534.

The rule in such cases is stated by a late writer as follows: "If no writing passed, the assignment of a debt may be proved by parol, even though there was an agreement unperformed to give a written transfer. It is sufficient proof of a parol assignment that some evidence of the debt, such as a bond or mortgage, or a transcript of judg-

ment, or a note held for the debt or part of it, was delivered to the assignee by the assignor with intent to transfer the title to the demand." Abbott's Tr. Ev., 2. *Hooker v. Eagle Bank*, 30 New York, 83. *Doremus v. Williams*, 4 Hun., 458. 12 Am. Law Reg., 61. So the assignment of a negotiable promissory note, secured by mortgage, carries with it the security. *Webb v. Hoselton*, 4 Neb., 308, and cases cited. And in Daniel on Negotiable Instruments, 557-8, it is said: "The assignment of a debt by whatever form of transfer, carries with it any bill or note by which it is secured, and the converse of the proposition is equally true, that the transfer by indorsement or assignment of a bill or note carries with it all securities for its payment, whether a mortgage or otherwise." This being so, the formal assignment in writing of the mortgage amounted to nothing, and gave Kuhns no additional rights to those that he possessed by the indorsement of the note, and delivery of the same with the mortgage. A material circumstance in connection with the alleged agreement is entirely unexplained. Thus, the alleged agreement is said to have been made with Kountze in the bank—in effect that he agreed to surrender the \$800 note of the defendants, and look solely to Noyes and the mortgaged property, in consideration of their making the assignment. The assignment was made as desired; why then was the note not delivered to the defendants in fulfillment of the alleged agreement? That it was neither claimed nor demanded is a strong circumstance tending to show that the alleged agreement never existed. The fact, too, that since the assignment they have admitted their liability upon the note, and promised to pay the same, is well nigh conclusive upon that point. Considerable stress is laid upon the fact that Kountze paid the Plattsburgh attorney his fees for the attempted foreclosure of the Noyes mortgage. Even if Kountze had employed the attorney, which the proof fails to show, he had a right to do so. In

fact, the Noyes note and mortgage were placed in his hands for the very purpose of being subjected to the payment of the defendants' note. The action of foreclosure was instituted for the purpose of subjecting such security to the payment of the same, and every effort, so far as appears, was made by the plaintiff and his agents to collect the amount due, or some portion thereof. So far as appears, the plaintiff and his agent, Kountze, have acted in the utmost good faith throughout the entire transaction. The verdict is against the clear weight of evidence, and, with the judgment, must be set aside, and a new trial awarded.

REVERSED AND REMANDED.

THE other judges concur.

AARON PALMER, PLAINTIFF IN ERROR, v. W. ROSS WITCHERLY, DEFENDANT IN ERROR.

1. **Statute of Frauds: EVIDENCE.** Testimony of a parol promise to pay for a stove, given to the jury without objection, was withdrawn and excluded by the court on the ground that the promise was to pay the debt of another, and not being in writing, was within the statute of frauds. Evidence examined and promise, *Held*, Not within the statute.
2. **Practice.** *Held, also*, That it is not good practice to permit testimony to be given without objection, and then ask to have it excluded.
3. ———. Ordinarily where an objection to testimony is not made when it is offered, and before it has gone to the jury, it should be deemed waived.

ERROR to the district court for Nemaha county. Tried below before POUND, J.

15	98
29	430
15	98
40	10
15	98
44	241
44	786
15	98
46	394
15	98
47	689
15	98
60	15

William T. Rogers and D. H. Mercer, for plaintiff in error, cited: *Clopper v. Poland*, 12 Neb., 69. *Lawrence v. Fox*, 20 N. Y., 268. *Dwyer v. Gibson*, 16 Wis., 580. *Calkins v. Chandler*, 36 Mich., 323. *Young v. French*, 35 Wis., 111. *Hoover v. Morris*, 3 Ohio, 56. *Wright v. M' Cully*, 67 Mo., 134. *Fitzgerald v. Morrissey*, 14 Neb., 198.

Osborn & Taylor, for defendant in error, cited: *Ander-son v. Davis*, 9 Vt., 136. *Eddy v. Roberts*, 17 Ill., 506. *Westhamer v. Peacock*, 2 Ia., 528. *Sternburg v. Callanon*, 14 Ia., 259. *Brown v. Weber*, 38 N. Y., 187. *Gower v. Stewart*, 40 Mich., 747. *Stewart v. Campbell*, 4 Am. Repts., 296.

LAKE, CH. J.

Of the errors complained of, the primary one is that of the county court, committed in ruling upon the admissibility of testimony offered to show a promise, by one R. Hatchett, to pay for a stove purchased by his wife, on her own credit from the witness Richards. The claim of Richards upon Hatchett for the stove had been transferred to the plaintiff in error.

The action in the county court was brought by the defendant in error on a due bill, not negotiable, duly assigned to him by said Hatchett, to whom the plaintiff in error had given it. There was no dispute as to the amount still unpaid on the due bill; the question was, simply, as to the liability of Hatchett for the stove. If he were liable to Richards for the stove, the account therefor having been assigned to the plaintiff in error, it was a good set-off to the due bill, *pro tanto*.

As before stated, the stove was purchased, at first, by Mrs. Hatchett, on her own credit. This is not disputed. At the time of the purchase, she was living with her hus-

band, and the stove was taken to his house, where it was used, and still remains, as the evidence shows.

Shortly after getting the stove, Mrs. Hatchett, it seems, separated from her husband leaving it in his possession, unpaid for. But she went to Richards, "and asked him to take back the stove," which he agreed to do, upon her promise to pay for its use while she had it. She told Richards where the stove was, and requested him to see Hatchett about it. Accordingly, Richards, as he testified, went to Hatchett, who still had the stove, to see about it. Hatchett said to him, that he could not do without the stove, and would pay him for it.

The plaintiff in error testified that after the account was transferred to him by Richards, Hatchett admitted to him that it "was correct," and "that he would pay it sometime, but was not able to pay it then." This admission, he says, was made on the occasion of a presentation, by Hatchett, of the due bill for payment, and before its transfer to the defendant.

And Hatchett himself, who was called for the defendant in error, swore, that "Richards came to him, and wanted to know about the stove." He at first, it seems, "told Richards that he didn't care about the stove, as he could get one cheaper." But finally he said to him that "if he would leave it, he would pay for it some time," but he could not do it then. With that Richards went away, leaving the stove, which Hatchett still retains.

After this testimony respecting Hatchett's promises to pay for the stove had gone to the jury without objection as it seems, it was, on motion of the attorney of the defendant in error, withdrawn by the court and wholly excluded from their consideration, for the reason that the promise was not in writing. This ruling was made on the supposition that Hatchett's agreement was to pay the debt of his wife. This, however, was an erroneous view of it. Fairly considered, the testimony shows that the sale from Richards

to Mrs. Hatchett was rescinded by his assenting to take the stove back, upon her promise to pay for its use; and that the subsequent arrangement, by which Hatchett promised to pay for the stove if Richards "would leave it" with him, created a new debt for which Mrs. Hatchett was in no respect liable. When Richards went to Hatchett to see about the stove, it was his own by virtue of the arrangement he had made with Mrs. Hatchett, and he could and probably would have taken it away, but for the re-sale to the husband.

But, even if the original sale had not been rescinded; and the promise of Hatchett had been, directly, to pay his wife's debt—in other words, if the promise had been clearly within the statute of frauds, the motion to take the testimony from the jury ought to have been overruled, for the reason that the objection to it came too late. *Eiseley v. Malchow*, 9 Neb., 174. It is not good practice to permit testimony of this description to be given without objection, and then ask to have it excluded. Ordinarily, when an objection to testimony is not made when it is offered, and before it has gone to the jury, it should be deemed waived; especially so where, as in this case, the party objecting has given substantially the same, and a portion of, the testimony objected to. *Browne on Frauds*, § 135. *Montgomery v. Edwards*, 46 Vt., 151. *Am. Reports*, 618.

For these reasons the judgment of the district and county courts must be reversed and the cause remanded to the county court for a new trial.

REVERSED AND REMANDED.

THE other judges concur.

15	102
15	203
18	190
15	102
40	576
15	102
56	397

LUCY F. SCUDDER, APPELLEE, v. MOSES W. SARGENT,
APPELLANT, AND JOHN G. ELLINWOOD, APPELLEE.

1. **Purchaser pendente lite.** A purchaser of land under a judgment subsequently opened, as provided in sec. 82 of the code of civil procedure, is not a purchaser *pendente lite*, although he make his purchase after the motion to open the judgment is filed, and notice thereof given to the plaintiff.
2. ———. Under this section an action cannot properly be said to be pending between the rendition and opening of the judgment.

APPEAL from the district court of Lancaster county. The plaintiff had judgment before POUND, J., in the district court of Cass county on the 21st day of November, 1879, declaring the title to the north half of the northwest quarter of section 30, in township 11 north, of range 9 east in Cass county to be in her, and that defendant Sargent had no interest therein. On the 7th day of January, 1880, Sargent by his attorneys served a notice on plaintiff of a motion to open the said judgment under sec. 82 of the civil code. On the 31st day of January, 1880, plaintiff conveyed the land to Ellinwood. At the April term, 1880, the motion of Sargent to open the judgment was sustained and he let in to defend. Ellinwood was admitted as a defendant, the cause taken on change of venue to Lancaster county, and on a trial at the May term, 1883, in that county, judgment was entered in favor of Ellinwood. Sargent appeals.

Brown & Ryan Bros., for appellant Sargent, on the subject of *lis pendens*, cited: *Bennett's Lessees v. Williams*, 5 Ohio, 462. *Harman v. Byram*, 11 W. Va., 511. *American Exchange Bank v. Andrews*, 12 Heisk, 306. *Steele v. Taylor*, 1 Minn., 274. *Watson v. Wilson*, 2 Dana (Ky.), 410. *Dresser v. Wood*, 15 Kan., 344. *Rider v. Kelso*, 53 Iowa, 367. *Center v. Bank*, 22 Ala., 743 and 757. *Allen v. Poole*, 53 Miss., 333. *Sugden on Vendors*, 281, 285.

Scudder v. Sargent.

Allen v. Morris, 5 Vroom (N. Y.), 159. *Hunt v. Haven*, 52 N. H., 162. *Tilton v. Cofield et al.*, 93 U. S. (3 Otto), 163. 1 Story's Equity, 406. As against the other parties to the suit, his purchase having been made while the motion to open was pending, and after service of notice of the motion, he and his purchase are treated as if they never had existence. The subsequent opening of the case by the order of the court for defense, was a mere formal matter and the date of such opening is immaterial. Whenever Sargent had filed his answer, affidavit as to publication, and want of actual notice, and his motion, and given notice to the opposite party, his right to defend was complete, and under the statute the court could not deny or abridge it. *Brown v. Conger*, 10 Neb., 234. *Savage v. Aiken*, 14 Neb., 315.

A. C. Ricketts, for appellee Ellinwood, cited: *Brown v. Conger*, 10 Neb., 238. *Taylor v. Boyd*, 3 Ohio, 338. *Ludlow v. Kidd*, 3 Ohio, 541. Wade on Notice, §§ 337 and 377, inclusive. *Page v. Waring*, 76 N. Y., 463.

LAKE, CH. J.

This case must be disposed of by a consideration of the right of a purchaser in good faith of land under a judgment subsequently opened pursuant to sec. 82 of the code of civil procedure, and reversed. The merits of that judgment, as between the original parties to the suit, are not involved in this inquiry.

The section in question provides that: "A party against whom a judgment or order has been rendered, without other service than by publication in a newspaper, may, within five years after the date of the judgment or order, have the same opened and be let in to defend; before the judgment or order shall be opened, the applicant shall give notice to the adverse party of his intention to make such an application, and shall file a full answer to the petition, pay all costs, if the court require them to be paid, and make it ap-

pear to the satisfaction of the court, by affidavit, that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense; but the title to any property, the subject of the judgment or order sought to be opened, which by it or in consequence of it shall have passed to a purchaser in good faith, shall not be affected by any proceedings under this section," etc.

It is urged on behalf of the appellant, as a proper construction of this section, that to be within its purview a purchaser must acquire the title before the application is made to open the judgment. In other words, that if he acquire it afterwards, although in good faith, he takes it *pendente lite* and is not protected. Under this theory it is claimed that, inasmuch as Ellinwood bought the land after the motion to open the judgment had been filed and notice thereof given to the plaintiff, he is outside of the statute and bound by the result.

But we cannot so hold. It is doubtless true that a purchaser *pendente lite* acquires no better title than that of his grantor is judged to be. And if that which his grantor appeared to have be found defective, the judgment is the exact measure of his own under the purchase.

According to all of the authorities the action in question ceased to be pending upon the rendition of the judgment in November, 1879, whereby the title to the property was found to be in Mrs. Scudder, the grantor. When was it again pending? Surely not until by the opening of that judgment the controversy which it had settled was renewed. This did not occur until the following April, and in the meantime Ellinwood had invested his money in the land on the faith of the judgment.

The judgment rendered in November was a final judgment, nor does the fact that it was liable to be opened or reversed by proceedings in error deprive it of that character. It fixed the rights of the parties to it, and their privies; and while it stood—until it was opened and the contro-

 Roggencamp v. Converse.

versy renewed, the action cannot properly be said to have been pending within the meaning of the statute. We see no reason for disturbing the judgment, and it will be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

WILLIAM ROGGENCAMP, APPELLANT, v. J. N. CONVERSE
ET AL., APPELLEES.

15	106
50	584
52	334
53	100
15	106
60	368
60	738

1. **Practice: JURY TRIAL.** In an action brought to remove a cloud from title to land, the court may but is not bound to give a jury trial.
2. **Adverse Possession: EVIDENCE.** In such an action, where the title relied on by the plaintiff is that given by the statute of limitations for adverse possession during the statutory time, a deed in fee of the land from the plaintiff to the defendant, given more than ten years before the bringing of the action, is competent evidence, in connection with a parol lease taken by the plaintiff from the defendant, to show that the possession was not adverse.
3. ———. Where possession is such as admits the existence of a higher title, to which it is subservient, it is not adverse to that title.

ON the 11th of March, 1882, Roggencamp brought suit in the district court of Lancaster county against Joel N. Converse, Anna E. Converse, and David S. Gray, trustee of J. N. Converse & Co., claiming title by adverse possession for more than two years to the following described lands: So much of the west half of the west half of the north-east quarter of section number ten, township number eight, range number eight east, as lies north of the center line of what was and is known as the Midland Pacific rail-

way. Also so much of the west half of the east half of the north-east quarter of section number ten, in township number eight north, of range number eight, as lies north of the center line of what was and is known as the Midland Pacific railway. Also so much of the west half of the west half of the north-west quarter of section number ten, township number eight, of range number eight, as lies north of the center line of what was and is known as the Midland Pacific railway, except the right of way, forty feet wide, upon the north side of the center line of said Midland Pacific railway on each of the above described pieces of land. Also a strip of land two hundred feet wide, upon the south side, fifty feet at right angles from the eastern line of the said Midland Pacific railway, commencing at the west line of the north-east quarter of section number ten, township number eight, of range number eight, and extending eastwardly, parallel with said center line, and fifty feet then from twenty-one hundred and eighty feet (2,180 feet). Defendants answered, setting up a general denial, and alleged title under a deed from Roggencamp and wife, filed for record March 31, 1871, at which time Converse "took possession of a part of said land," the consideration in the deed being the sum of "one dollar" and "of a regular station for business upon the north-east quarter of section ten or the north-west quarter of section eleven, township eight, range eight east, in said county, by the Midland Pacific railway, as well as for the benefits growing out thereof to the public generally," and "to the grantors in particular." Defendants had judgment below before GASLIN, J., sitting for POUND, J., and plaintiff appeals.

H. D. Rhea and Foxworthy & Son, for appellant, on right to trial by jury, cited: *Horbach v. Miller*, 4 Neb., 31. Comp. Stat., § 280, p. 567. On question of adverse possession contended: 1. Two persons cannot hold constructive possession of land at the same time. 3 Washburn, 124.

 Roggencamp v. Converse.

Hodges v. Eddy, 38 Vt., 327 and 344. *Faught v. Holway*, 50 Me., 24. 2. One may acquire title by adverse possession, by making the entry under a contract to lease or purchase. Comp. Stat., § 8, p. 287. *Sumner v. Stevens*, 6 Met., 338, and authorities cited. *Maltoner v. Dimmick*, 4 Barb., 566. *Ashley v. Ashley*, 4 Gray, 200. 3. The plaintiff herein has been in actual occupancy of the land, clear, definite, positive, and notorious, for the period prescribed by statute. His possession has been continued adverse and exclusive to that part of land so claimed, and of which plaintiff took possession immediately after the execution of his deed to defendant, and the evidence shows that the said plaintiff went into possession with intent to claim title to the same, and that he has appropriated the profits thereof under a claim of right which we think is strong proof of title by adverse possession. *Ford v. Wilson*, 35 Miss., 504. *Owen v. Morton*, 24 Cal., 376. *McNamee v. Moreland*, 26 Iowa, 109.

O. P. Mason, for appellees.

Plaintiff was not entitled to jury trial. *Smith v. Anderson*, 20 Ohio State, 76. *Larkin v. Wilson*, 28 Kan., 513. On adverse possession, cited: *Sparrow v. Hovey*, 44 Mich., 63. *Thompson v. Felton*, 54 Cal., 547. *Alexander v. Polk*, 39 Miss., 755. *French v. Pearce*, 8 Conn., 439. *Jackson v. Johnson*, 5 Cow., 92. *Jackson v. Schoonmaker*, 2 Johns., 234.

LAKE, CH. J.

This case comes here by appeal from the district court for Lancaster county. The plaintiff claims that he was erroneously denied a jury trial. There is no error in the ruling of the court below in this particular. The action was brought to remove a cloud alleged to be resting on the plaintiff's title to land of which he claimed to be the own-

er in fee, and was, therefore, an equitable one, in which the court might but was not bound to give a jury trial. Code, §§ 280-281. *Harral v. Gray*, 10 Neb., 186.

It is claimed also that the finding and judgment are not supported by the evidence; and in this connection, that a deed in fee simple of the premises from the plaintiff and his wife to Joel N. Converse, one of the defendants, was improperly admitted in evidence in defense of the action. The objection made to the admission of this deed was, that it was "immaterial and irrelevant, and not connected with this case at all." That it can be seriously urged that this objection should have been sustained is not a little surprising.

In the endeavor to make out his case, the only title to the land which the plaintiff sought to show in himself was that of possession. He claimed simply that he had occupied it adversely to the defendants for ten years and upwards, and that, consequently, whatever claim they had to it was barred by the statute of limitations.

The due execution and delivery of this deed to Converse was abundantly proved; in reality it was admitted. And it was under this deed that the defendants asserted their claim to the ownership of the land. They claimed on the trial, and produced an abundance of evidence to show that the plaintiff's possession was simply as lessee under the title conveyed by the deed, and not in hostility to it. The deed was both competent and material evidence, not only as showing the character of the defendants' title, but as being strongly corroborative of the oral testimony given to the fact that about the time of its execution the plaintiff had fully recognized the ownership of Converse under it, by becoming his tenant.

The evidence is not only sufficient to sustain the findings of the district court upon it, but it leaves no doubt whatever as to the fact that the plaintiff's possession was such as admitted the existence of a higher title to which

 Sandwich Mfg. Co. v. Shiley.

it was subservient; therefore it was not adverse to that title. *Jackson, ex. dem. Swartwout, v. Johnson*, 5 Cow., 74. The judgment is right, and it will be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

THE SANDWICH MANUFACTURING COMPANY, PLAINTIFF
IN ERROR, V. SAMUEL L. SHILEY, DEFENDANT IN
ERROR.

1. **Principal and Agent: AUTHORITY OF AGENT.** The unauthorized act of an agent, when ratified by the principal, is equally binding as though embraced within the scope of the agent's power, and when the issue in a cause turns upon the authority of an agent, and there is testimony tending to prove the ratification by the principal of the act of such agent, constituting the cause of action, the verdict of a jury finding such act to be the act of the principal will not be disturbed.
2. **Instructions to Jury: SETTING ASIDE VERDICT.** It is the duty of a court to instruct the jury in the law of the case, whether requested so to do by counsel or not, and when it fails to do so, and the jury find a verdict which, upon a view of the whole case, is clearly wrong, such verdict will be set aside and a new trial ordered. But otherwise when, upon a general view of the case, the verdict seems to be right.

ERROR to the districtcourt for York county, where the cause had been brought on appeal from the county court. In 1881, Shiley bought of the Sandwich Manufacturing Company, through H. M. Miller, the agent of said company, an Adams & French harvester. He gave his note in part payment and a second-hand Marsh harvester for the balance. This was sold by Miller to another party.

15	109
39	836
15	109
43	402
15	109
47	299

The machine bought by Shiley was warranted but failed, and was returned by him and his notes delivered up, but the company refused to return the second-hand machine, and notified Shiley that it knew nothing about it and that he would have to look to Miller for the same as it did not recognize any trade Miller had made for old machines. Hence this action to recover its value as well as a sum paid by Shiley for freight on the machine purchased by him. Verdict below in county court for Shiley. Defendant company appealed to the district court where, on trial before GEORGE W. POST, J., and a jury, verdict and judgment were in Shiley's favor.

Scott & Frank, for plaintiff in error, cited: *Nichols v. Hail*, 4 Neb., 215. *Ladd v. Hildebrandt*, 27 Wis., 144. 3 Greenleaf, 429. 1 Wait's Actions and Defenses, 227.

Sedgwick & Power, for defendant in error, cited: *Furnas v. Frankman*, 6 Neb., 429. Story Agency, §§ 19, 126. *Bloomer v. Denman*, 12 Ill., 240. *Doan v. Duncan*, 17 Id., 272. 2 Kent Com., 621, et seq., and notes.

COBB, J.

There can be no doubt of the correctness of the position of the counsel for plaintiff in error in their brief that the authority of Miller, the agent, to bind the plaintiff company was restricted to the sale of a certain kind of machine and did not extend to the purchase of an old one. But it is clearly proven that the said agent assuming to act for his principal did, in point of fact, take an old machine from the defendant in error in part payment for a new one purchased by defendant from plaintiff in error. It is also in proof that the said agent sold the old machine in the name of his principal and there is testimony tending to prove that the principal, plaintiff in error, accepted and appropriated the proceeds of such sale. The principal,

though not bound by the acts of the agent outside of the scope of his agency, was nevertheless competent to ratify them, and when ratified by the principal such acts were as binding upon the principal as though embraced in the letter of the agent's authority.

Plaintiff in error also makes the point that the court erred on the trial of this cause in failing to instruct the jury upon the law of the case. Upon turning to the bill of exceptions we find the following: "At the close of the trial the parties having no instructions to be submitted, the counsel for the defense asked the court to instruct the jury on the law in the case. The court declined so to do for the reason that he has not had time to write any instructions in the case. To the refusal of the court, to instruct the jury as asked, the defendant excepts."

It is undoubtedly the duty of the judge presiding at a trial to instruct the jury upon the law of the case which is to be observed by them, and should a case arise in which it shall appear from the record that the jury has taken a wrong view of the law applicable to the case, and where the judge has failed to instruct them, whether requested by counsel or not, this court would not hesitate to grant a new trial. But when it is apparent that without instructions the jury has come to a correct conclusion, no error lies. See Proffat on Jury Trials, § 311, and authorities there cited. We think the verdict and judgment about right, and they should not be disturbed.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

15	112
17	615

15	112
33	106

15	112
55	443

FRANK P. THOMPSON, PLAINTIFF IN ERROR, V. DAVID
R. STETSON, DEFENDANT IN ERROR.

1. **Pleading:** PETITION ON AN ACCOUNT. The action was on an account, a copy of which was attached to and made a part of the petition. The account was between the plaintiff in error and F. L. Stetson & Co., and showed a balance in favor of the latter. There being no assignment of the account by F. L. Stetson & Co. to David R. Stetson, the defendant in error, nor any allegation showing ownership in him, *Held*, That the petition would not support the judgment in his favor.
2. **Attachment:** SUCCEEDING ORDERS OF. Several orders of attachment in an action may be issued at the same time, or in succession; but in such case only a single affidavit is necessary.

ERROR to the district court for Cass county. Tried below before POUND, J.

T. B. Wilson and *M. H. Sessions*, for plaintiff in error.

Smith & Beeson, for defendant in error.

LAKE, CH. J.

The plaintiff in error was defendant in the court below. The judgment of which he here complains was rendered on default, under a service by publication. The cause of action, as alleged, was an account stated, a copy of which was attached to and made a part of the petition. An inspection of this account, however, shows that it is not between the plaintiff and defendant in error, but between F. L. Stetson & Co. and the plaintiff in error. No connection between F. L. Stetson & Co. and the defendant in error respecting this account is shown. By what right the latter seeks to enforce the payment of it does not appear. There is no assignment of the ownership by F. L. Stetson & Co. to David R. Stetson either alleged or shown. For aught that is disclosed by the record, F. L. Stetson & Co. are

Thompson v. Stetson.

still the owners of it, and could recover the amount due thereon from the plaintiff in error. Such being the character of the petition it will not support the judgment.

Besides the objection that the petition fails to state a cause of action in favor of the defendant in error, it is urged, as a ground for a reversal of the judgment, that the affidavit for the attachment was not filed until after the order was issued. There is no ground whatever for this objection, which is made, perhaps, upon a misapprehension of the steps taken in the case. There was an affidavit for an attachment filed on the 6th of March, 1882, the same day on which the order that was afterwards quashed was issued. The order in question was sued out on the 30th of June following, and required no additional affidavit, and none for it was in fact filed. The first affidavit was sufficient to support it. The affidavit filed on the 3d of July was not for an attachment, although it is so designated by the clerk of the court; it was simply preliminary to making service by publication. The affidavit filed on the 6th of March is in all respects conformable to the requirements of the law. Several orders of attachment "may, at the option of the plaintiff, be issued at the same time, or in succession; but such only as have been executed shall be taxed in the costs, unless otherwise directed by the court." Code, § 202. In such case, however, but one affidavit is necessary.

For the single reason that the judgment is not supported by the petition, it must be reversed, and the case remanded to the district court for further proceedings conformable to law.

REVERSED AND REMANDED.

THE other judges concur.

JOHN A. BUCKSTAFF ET AL., APPELLEES V. JOHN J.
DUNBAR ET AL., APPELLANTS.

Mechanic's lien. Upon the facts stated in the opinion, *Held*, That the parties furnishing material for the erection of a dwelling house were entitled to a mechanic's lien thereon.

APPEAL from Lancaster county. Heard below before
POUND, J.

O. P. Mason, for appellant.

Burr & Marshall, for appellee Buckstaff.

Harwood & Ames, for appellees Hoagland Brothers.

MAXWELL, J.

On the 2d day of November, 1880, one William Pound held a contract of purchase from the state for the north half of the south-east quarter of sec. 10, township 8, range 6 east of 6th P.M., the contract price being the sum of \$720, one-tenth of which had been paid. On that day he went to Mr. Buckstaff's lumber yard, in Lincoln, and represented to him that he was the owner of the land above described and desired to purchase lumber to erect a house for a home on said land; he wanted \$500 or \$600 worth. On that and the succeeding day lumber to the amount of \$261 was sold to him by Buckstaff, being carried away by the teams of the appellant. Being unable to obtain more lumber from Buckstaff, Pound, on the 4th of November of that year, applied to Hoagland Brothers, of Lincoln, and stated that he was going to erect a dwelling on his farm near Centerville—giving the above description of the land, and desired to purchase lumber, which he would pay for within sixty days. Lumber to the amount of \$279.46 was there-

upon sold to him, being delivered between that time and the 17th of the month, the lumber being hauled by Mr. Dunbar's teams. On the 5th of November of that year, Dunbar, in answer to an inquiry by Hoagland, said "that Pound was all right, and we would get our money without doubt." Hovey & Peck also filed a lien for hardware sold to Pound, the amount claimed being \$37.50. These parties filed mechanics' liens upon the interest of Pound in the land and buildings thereon, and this action is brought to foreclose the liens. Pound makes no defense. Dunbar claims to have purchased the land in question from Pound about the middle of October, 1880, the assignment of the certificate being dated November 2d of that year, and the consideration being the sum of \$200, to be paid as hereafter stated. And he further claims that Pound was to erect the house in question at his own cost and expense for the sum of \$600, Pound to be permitted to reside therein with his family for one year after its completion. He therefore alleges that the lumber and material being sold to Pound upon his individual responsibility the property in controversy is not subject to a mechanic's lien. On the trial of the cause the court rendered judgment against Pound for the amount of the claims and ordered the house and the interest of Dunbar in the premises to be sold to satisfy the same. Dunbar appeals to this court.

It appears from the testimony that the only party who had possession of the premises at the time of the sale and assignment of the certificate of purchase was Pound, and that such possession continued without interruption until after the house was erected. It also appears that Dunbar paid the carpenters for building the house, Pound stating that he was unable to do so. The testimony fails to show that Dunbar notified any of these material men that he was the owner of the premises, although he knew, or at least had cause to know, that the lumber and material were being furnished to Pound, upon the belief that Pound was

the owner of the same. Suppose Mr. Dunbar had purchased a horse or other personal property of Pound, and without a change of possession or any act to indicate a change of ownership had permitted Pound without objection to sell or mortgage such property to one who purchased or took a mortgage on the property in good faith, could Dunbar assert his ownership over that of such purchaser or mortgage? That he could not I believe all the cases agree.

In 1 Greenleaf Ev., § 207, the rule is thus stated: Admissions, whether of law or fact, which have been acted upon by others, are conclusive against the party making them in all cases between him and the person he has thus influenced. It is of no importance whether they were made in express language to the person himself, or *implied* from the open and general conduct of the party. For in the latter case the implied declaration may be considered as addressed to every one in particular who may have occasion to act upon it. In such cases the party is estopped on grounds of public policy and good faith from repudiating his own representations. The rule is, that a party who negligently or culpably stands by and allows another to contract on the faith and understanding of some fact which he can contradict, cannot dispute that fact in an action against the person whom he has assisted in deceiving; as, where a vendor is held out, or is suffered to hold himself out as authorized, the owner is concluded. *Stephens. v Baird*, 9 Cow., 274. *Pickering v. Busk*, 15 East., 38. *Dyer v. Pearson*, 3 B. and C., 38. In the case under consideration, Dunbar not only failed to state to these parties that he had purchased the premises, but assured the Hoaglands that Pound was all right and they would receive their pay. To permit a party to acquire property in this manner, of which others, with his tacit approval, had been defrauded, would be a reproach upon the law. Pound was not a builder, as Dunbar was well aware, and it is very clear that he could not have purchased the lumber upon credit except upon the supposition that he was the owner of the land.

The case differs from that of *Doolittle v. Goodrich*, 13 Neb., 296. In that case one McLelland, a builder, purchased lumber on his own account to erect a house for one Francis Goodrich. There was no pretense that the house was to be erected for McLelland, and the only question for determination was whether or not McLelland was the agent of Goodrich, and the court held that he was not.

A material fact in this case is the consideration paid by Dunbar to Pound. It appears from Dunbar's testimony that he sold one-half of a stallion to Pound for the sum of \$600. Of this sum \$200 was to be applied in payment of the land, and \$400 to be payment of the house. It also appears that the \$400 was secured by a chattel mortgage on the horse. He testifies that the mortgage was given up to Pound after the erection of the house, and that the matter was then settled in full. He afterwards states that in July, 1881, he wrote to Pound "to bring the horse back and fix or there would be trouble;" that Pound thereupon brought the horse back and he gave him a mule and \$200 for his interest. Dunbar thus in fact paid but little more than the value of Pound's interest in the land as agreed upon by the parties themselves. It is very clear that justice has been done, and the judgment is in all things affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

15 118
30 14615 118
36 59415 118
58 512EDWARD COLLINGWOOD, PLAINTIFF IN ERROR, v. THE
MERCHANTS BANK, DEFENDANT IN ERROR.

1. **Pleading:** PETITION ON ACCOUNT. The provisions of section 129 of the code, which provides in effect that a plaintiff may set out in his petition a copy of the account or instrument sued on, with all credits, and allege that there is due thereon from the defendant to the plaintiff a specified sum, is permissive merely.
2. **Banks:** PAROL AGREEMENT CONCERNING DRAFTS. One C., a depositor, purchased sight drafts at a bank to pay for cattle that he expected to purchase in Colorado. At the same time he made a parol agreement with the bank that if he did not purchase cattle he might return the drafts to the bank and receive credit for the amount thereof with interest. *Held*, That the parol agreement was valid, and did not contradict the written agreement, as it merely showed the purpose for which the drafts were procured and delivered.
3. ———: ———: LIABILITY OF HOLDER. Where sight drafts were purchased under an agreement that if not used for a specified purpose they could be returned to the bank drawing the same and credit given, the drafts being drawn in April, the drawee being solvent until July of that year, but no presentment was made at any time, nor any offer to return the drafts to the bank until the succeeding December, *Held*, That as the drafts had neither been presented nor returned to the bank in a reasonable time the holder must bear the loss.

ERROR to the district court for Saline county. Heard below before WEAVER, J.

Brown & Ryan Bros., for plaintiff in error, cited: *Commercial Bank v. Hughes*, 17 Wend., 94. *Chitty on Bills*, 218. *Pollard v. Bowen*, 57 Ind., 232. *Sheldon v. Horton*, 43 N. Y., 97. *Bryant v. Wilcox*, 49 Cal., 47. *Barclay v. Weaver*, 19 Penn. St., 396. *Jones v. Fales*, 4 Mass., 252. *Curtis v. Martin*, 20 Ill., 557. *Wood v. Price*, 46 Id., 436. If there has been in fact a waiver of demand or notice, drawer is held in case of non-payment. *Tucker & Co. v. Fairbanks*, 98 Mass., 101. *Parson v. Dickenson*, 23

Mich., 56. *Coddington v. Davis*, 1 New York, 86. *Spencer v. Harvey*, 17 Wend., 489. *Andrews v. Simms*, 33 Ark., 777.

Marquett, Deweese & Hall, for defendant in error.

MAXWELL, J.

The plaintiff alleges in his petition that in April, 1875, he had on deposit in the defendant bank the sum of \$5,500, upon which, under an agreement, the bank was to pay eight per cent interest; that at that time the plaintiff, intending to go to Colorado for the purpose of purchasing a herd of cattle of one Daniels, entered into an agreement with said bank to surrender his certificates of deposit to the bank and take in lieu thereof certain bills of exchange or sight drafts on New York to the amount of \$5,500; that it was expressly agreed that in case the plaintiff did not purchase said cattle of Daniels he was not to present the drafts to the drawee but should return the same to the defendant, who was to allow him eight per cent interest thereon, and to pay the plaintiff the sum of \$5,500; that if the plaintiff should purchase said cattle of Daniels, and could get the time of payment of the money extended more than thirty days, then he was to return the drafts to the bank and was to receive in lieu thereof time drafts for a like amount, and in no event was the plaintiff to negotiate said drafts without thirty days' notice thereof; that in pursuance of said agreement the plaintiff, on the twenty-fourth of April, 1875, did surrender said certificates of deposit, and received in lieu thereof sight drafts on Saunders & Hardenburg, of New York, for the sum of \$5,500; that on the twenty-fifth of April, 1875, the plaintiff went to Colorado to purchase said cattle from Daniels, but found that said herd had already been sold, and relying upon the agreement with the defendant he did not present said drafts to Saunders & Hardenburg for acceptance or payment, but retained the

same in his own possession; that on or about the twenty-fifth of July, 1875, Saunders & Hardenburg failed in business, and were and are wholly insolvent; that on the eighth of December, 1875, the plaintiff returned from Colorado to Lincoln and offered to surrender said drafts, and demanded the sum of \$5,500 thereon together with interest at eight per cent thereon, but said defendant refused to pay the same or any part thereof, wherefore the plaintiff prays judgment for the sum of \$5,500 together with interest thereon from the twenty-fifth day of April, 1875. A demurrer was sustained to the petition in the court below and the action dismissed. Does the petition state a cause of action?

The first objection in support of the demurrer is, that there is no allegation in the petition that there is due the bills of exchange a certain sum which the plaintiff claims with interest. This objection, however, is untenable, if the facts stated in the petition show a cause of action against the defendant in favor of the plaintiff. It is good pleading to state the amount due, and undoubtedly if the proper motion is filed for that purpose may be required in all cases.

Sec. 129 of the code provides that, in an action, counter-claim, or set-off founded upon an account, promissory note, bill of exchange, or other instrument for the unconditional payment of money only, it shall be *sufficient* for the party to give a copy of the account or instrument with all credits and indorsements thereon, and state that there is due to him on *such account or instrument* from the adverse party a specified sum which he claims with interest.

This mode of pleading is permissive merely, but a plaintiff, if he so desire, may state the facts in a different form.

The case of *Gage v. Roberts*, 12 Neb., 276, failed either to allege the making and delivery of the note, or that there was due *thereon*, or words to that effect, from the defendant

petition did not show a liability of the defendant to the plaintiff.

The second objection is, that this action is upon the parol agreement, which contradicts the written agreement and is therefore invalid. The written agreement, as expressed in the drafts, was for the drawee to pay at sight the amount stated in the drafts. The parol agreement, as alleged in the petition and admitted by the demurrer, was that the plaintiff might use the drafts or not, as he saw fit. If he did not, he might return them to the bank and he would receive credit for the same. The parol agreement does not change or attempt to change the terms of the written agreement in any manner *if* the drafts are presented to the drawees for acceptance and payment; but merely provides that if the holder does not require the funds he need not use the drafts. The written agreement therefore is not the entire agreement, but it is partly in writing and partly in parol. Or even if we treat the parol agreement as collateral to the written agreement, still it would be valid. Thus, suppose an absolute deed is given for real estate. In such case the deed purports to convey the entire title, yet parol evidence is admissible to show the *purpose* for which the land was conveyed, and if as security for a debt it will be declared a mortgage. On the same principle, parol evidence is admissible to show the purpose for which the bills of exchange were delivered to the plaintiff in this case.

An agreement similar to this was before the supreme court of Indiana in *Pollard v. Bowen*, 57 Ind., 232, and held to be a valid agreement. The second objection is not well taken.

A third ground of objection is not referred to in the brief of either counsel, that is, upon whom must the loss fall in case of the insolvency of the drawee before the drafts are presented where there has been great delay in presenting them? In the absence of an agreement as to the plaintiff any sum whatever, and it was held that the

bill must be presented to the drawee for acceptance within a reasonable time, even though the drawer or indorser has sustained no actual loss by the delay, and has continued solvent up to the time of presentment. 1 Parsons on Notes and Bills, 266, and cases cited in notes. 1 Daniel on Neg. Inst., 344-5, and cases cited in notes. Among the reasons for presentment in a reasonable time are those stated by Eyrie, C. J., in *De Berdt v. Atkinson*, 2 H. Bl., where it is said: But consider on what ground an early demand is in general required. It is because if any delay takes place the effects may be gone out of the hands of the acceptor; and if the holder choose to wait he does it at *his own risk*. Now does not that rule prevail in this case? The drafts were made on the 24th of April, 1875. The parties upon whom they were drawn continued solvent to the latter part of July of that year, a period of about three months. The time required to go to Colorado and purchase the herd spoken of could not in any event have required longer than thirty days. The fact that the plaintiff took the drafts to purchase cattle would not prevent his applying them to any other purpose. He had the right to present them for acceptance and draw the money called for at any time. The bank, it is presumed, had funds in the hands of Saunders & Hardenburg to pay them, and there is no allegation that such was not the case. Now if these funds were lost through the laches of the party holding the drafts it would seem but just that he should bear the loss. The petition fails to state any reason for the failure of the plaintiff to either present the drafts for acceptance or return them to the defendant within a reasonable time, and for that reason does not state a cause of action. It may be said that the question of due diligence is one of mixed law and fact for a jury to determine under proper instructions. This is true where the facts are in dispute. But where the facts are conceded, as on a demurrer to a pleading, it is for the court to apply

H. & G. I. R. R. Co. v. Ingalls.

the law to the facts. *Pollard v. Bowen*, 57 Ind., 232.
The judgment is clearly right and must be affirmed.

JUDGMENT AFFIRMED.

LAKE, CH. J., concurred.

COBB, J., took no part in the decision.

HASTINGS AND GRAND ISLAND R. R. CO., PLAINTIFF IN
ERROR, v. CHARLES C. INGALLS, DEFENDANT IN
ERROR.

1. **Jurors.** Objections to the competency of jurors must be assigned in the motion for a new trial to be available in the supreme court.
2. **Eminent Domain: RAILROAD: DAMAGES.** Where a railroad is built upon a public road the owner of the land is entitled to recover the damages to his land by reason of the additional burden placed thereon by the appropriation of the road to the use of the railway company. LAKE, CH., J. dissenting.
3. ———: ———: ——— **ACTION: PARTIES.** A purchaser of real estate and holding the same by contract may maintain an action in such case for the damages sustained by him. The holder of the legal title should be joined, but if no objection is made for non-joinder the equitable owner may recover his actual damages.
4. **Evidence** examined and held to sustain the verdict.
5. **U. S. Government Land: RIGHTS OF CLAIMANT.** A person having been in possession of a timber culture claim for less than ten years, whose possession is not injured or disturbed, cannot maintain an action for damages to the land itself caused by the construction of a railroad on a public road which passes along one side of such claim.
6. **Motion for New Trial.** Under the general assignment, "errors of law occurring at the trial," objections to the instructions given or refused cannot be considered. Such instructions must be pointed out in some way either by number or other means of identifying the same.

15	123
16	514
17	435
19	913
19	314
24	303
15	123
36	603
15	123
29	513
15	123
34	248
34	287
35	702
15	123
45	340
15	123
46	312
15	123
48	884
15	123
53	649
55	130
15	123
58	241

ERROR to the district court for Adams county. Tried below before GASLIN, J.

John Doniphan and Batty & Ragan, for plaintiff in error, contended that the law authorized the building of the road along the highway. Gen. Stat., 187, 188; that such occupation by a railroad is a legitimate use thereof and the legislature could grant this power. *Murphy v. Chicago*, 29 Ill., 279. *Hinchman v. Patterson*, 17 New Jersey Eq., 75. *Milbourn v. City*, 12 Iowa, 246. *Clinton v. Cedar Rapids*, 24 Id., 455. On subject of additional burthen, cited: *Cooley Const. Lim.*, 555. *Barney v. Keokuk*, 4 Dillon, 593. *Attorney General v. Railroad*, 125 Mass., 515. *Hobart v. Railroad*, 27 Wis., 194. *West v. Bancroft*, 32 Vt., 367. *Kelsey v. King*, 32 Barb., 410. *Railroad Company v. Applegate*, 8 Dana, 289. *Elliot v. Railroad*, 32 Conn., 579. Ingalls cannot recover. *Heutz v. R. R.*, 13 Barb., 646. *Davison v. R. R.*, 3 Cush., 91. *Railroad v. Allen*, 39 Ill., 206. *Central Railroad v. Heltfield*, 5 Dutcher, 206. Mills on Eminent Domain, §§ 146, 160. *Roud v. Townshend*, 26 Vermont, 670. *Thurston v. Portland*, 2 J. J. Marsh, 73. *Peoria R. R. v. Bryant*, 57 Ill., 473.

Brown & Ryan Brothers, for defendant in error, reviewed the authorities cited by plaintiff seriatim, contending that they were not applicable to sustain its position; thus the case of *Hinchman v. Patterson*, 17 N. J. Eq., 75, says that it is settled law of that state that "a railroad company, authorized to acquire land for the use of their road by condemnation and required to make payment or tender of compensation before occupying the land, cannot construct their road across or upon a highway without making compensation to the owner of the soil occupied by the highway." This principle is fully sustained by the cases of *Railroad v. Heisel*, 38 Mich., 62. *Trustees of*

Presbyterian Society v. The Auburn & Rochester R. R. Co., 3 Hill, 567. *Williams v. Railroad*, 16 New York, 97. *Wagner v. Railroad*, 25 New York, 526. See also *Cooley Const. Lim.*, 255. On right of Ingalls to recover, cited: *Civil Code*, § 319. *Reading R. R. v. Boyer*, 13 Penn. State, 497. *Cain v. Railroad*, 54 Iowa, 262. *Robbins v. Railroad*, 6 Wis., 610. *Field on Damages*, § 737. *Ingram v. Railroad Company*, 38 Iowa, 669. *Proprietor of Locks v. Corporation*, 10 Cush., 385.

MAXWELL, J.

In 1879 the defendant in error, Ingalls, commenced an action against the plaintiff in error to recover damages, by reason of the location and construction of the plaintiff's railroad in the public road, on lands which the defendant had purchased and was in possession of, but had not fully paid for.

On the trial of the cause a verdict for \$500 was given in favor of Ingalls, upon which judgment was rendered. The cause of action is set forth in the petition as follows:

"And the plaintiff further says, that on the west side of the land above described for the distance of one mile there is a public highway, sixty-six feet wide, the east half of which said highway is on the lands of this plaintiff, and this plaintiff owns the east half of said highway subject to the right of way of the public to pass and repass thereon in the usual carriages and conveyances ordinarily used by the public in traveling along the public highways.

"And this plaintiff further says, that the south portion of the land above described lies adjacent to the city of Hastings, lying immediately west of said tract of land, and is only separated therefrom by the highway aforesaid

"And plaintiff further says, that prior to the grievances hereinafter mentioned, said land was very valuable by reason of its location adjacent to said city and also by

reason of said highway, which was used by a large number of the traveling public in going to and from said city of Hastings.

"And plaintiff further says, that the defendant wholly disregarded the plaintiff's rights in the premises, wrongfully and without any legal authority whatever did, on or about the 16th day of September, A.D. 1879, lay the track of its said railroad along and upon the east side of said highway, throughout the whole distance where said highway passes along the west side of the plaintiff's premises as above described, so that the whole of the defendant's railroad track rests upon that portion of the said highway which passes over the lands of this plaintiff; and that the said defendant is now and for several months last past has been running its trains of cars along and upon the said highway and on the lands of the plaintiff as afforesaid."

A motion for a new trial was filed by both parties and overruled, the grounds assigned in the plaintiff's motion are in substance: *First.* That the damages are excessive. *Second.* Error in the assessment. *Third.* That the verdict is not sustained by sufficient evidence. *Fourth.* Errors of law occurring at the trial.

Numerous objections are made to certain of the jurors, who it is claimed were biased against the plaintiff. No objection of the kind was made in the motion for a new trial, and it cannot now be considered.

I. The plaintiff claims to have obtained the right of way from the county commissioners of Adams county, paying them therefor the sum of \$450; that by reason of such grant of the right of way Ingalls is precluded from maintaining an action, the wrong being of the kind for which the law provides no remedy; that the land in question having been taken for a public road, the legislature and proper public authorities may apply it to any public use they may see fit. The decisions are conflicting upon this question.

In *Williams v. New York Cent. Railway*, 18 Barb., 222-246, it is said: "A railroad is only an improved highway, and the use of the street by a railway is one of the modes of enjoying a public easement." In that case the statute authorized the railroad company to intersect and build their road upon any public highway. The decision of the supreme court was reversed in the court of appeals (16 New York, 97), where it was held that the appropriation of a highway by a railroad company was the imposition of an additional burden upon and a taking of the property of the owner of the fee within the meaning of the constitutional provision, which forbids such taking without compensation.

In the case of the *Pres. Society v. The Auburn & Roch. R. Co.*, 3 Hill, 567, the action was for trespass for entering upon the plaintiff's premises, digging up the soil and constructing a railroad track upon it. The defense was that the *locus in quo* was a public highway, and the charter of the corporation expressly authorized it to construct its road upon and across any highway. The court held that the legislature had no power to authorize the company to enter upon and appropriate the land in question for purposes other than those to which it had been originally dedicated in pursuance of the highway act, without first providing "a just compensation therefor." This decision, so far as we are aware, has never been overruled in that state.

In the late case of *Story v. New York Elevated Railway Company*, 15 Cent. Law Journal, 391, it was held by the court of appeals of New York that the erection of an elevated railway in a street is inconsistent with its use as a street, and constitutes such an appropriation of the adjoining lot owner's easement of the passage as is forbidden by the constitutional inhibition of the taking of private property for public purposes without compensation.

In *Williams v. Nat. B. P. R. Co.*, 21 Mo., 580, the court held that the grant of the right of locating a plank road

upon a country road did not preclude the owner of the soil on which the plank road was built from recovering compensation.

These cases seem to be founded upon justice, and meet our approval. In cases holding a contrary view it is said that a steam railway is an improved public highway, and is no additional burden upon the land. But this view cannot be sustained. It is true that a railway for the transportation of all persons who may desire, upon payment of fare, to be carried in the cars of the company, that mode of travel being exclusive, is a highway. But it is not a *common* highway in the ordinary sense of the term nor in the ordinary mode of travel. A canal is also a highway, but no one would contend that the corporation constructing a canal could appropriate a public road without compensation to the owner of the land. We have no doubt the construction of a railroad upon a public road is an additional burden upon the land, for which the owner is entitled to compensation.

II. The legal title to the land in question at the time of the location of the railroad was in the Union Pacific Railway Company, and the proof shows that Ingalls was in default in his payments, and that the contract was subject to forfeiture.

The company did not take advantage of the default, however, and there is a stipulation in the record that since the trial in the court below Ingalls has paid in full for the land, but has not yet received a deed. It is claimed upon this state of facts that he cannot recover—the right of recovery belonging alone to the owner of the fee. It is a familiar rule that where a contract is made for the sale of land, the vendor becomes in equity and by construction of law a trustee for the vendee of the real estate, and the vendee becomes a trustee of the vendor for the purchase money; the vendee is the owner of the land although the legal title continue in the vendor. Tiffany & Bullard on

Trusts and Trustees, 491. Story's Eq. Juris., §§ 790-1212. *Seton v. Slade*, 7 Ves., 264. *Craig v. Leslie*, 3 Wheat, 577. *Beverly v. Peters*, 10 Peters, 532. *Henson v. Ott*, 7 Ind., 512. Ingalls had an estate in the land and was in possession. To the extent of the estate he was entitled to recover. At the most there was a defect of parties; but no objection of this kind was made in the pleadings, and therefore he was entitled to recover for the injury to the extent of his interest. It is agreed that he has paid for the land in full, so that in no contingency can the company be liable to another party for the injury here complained of.

III. Excessive damages. The testimony upon the question of damages is conflicting, some of the witnesses putting the depreciation in value of the property of Ingalls by reason of the appropriation by the railroad company at \$4,000. This being so, and the weight of testimony being that the damages were greater than the amount of the verdict, this objection is not well taken. The second and third objections are to the same effect as the first.

IV. Errors of law occurring at the trial. The statute provides that the grounds of the motion for a new trial may be assigned in the language of the statute without further or other particularity. The bill of exceptions contains a record of the trial, and any error appearing therein may be considered under the general assignment of "errors of law occurring at the trial." But under our present statute instructions are required to be filed with the clerk before being given to the jury, and are made a part of the record proper—not the bill of exceptions. There is good reason for allowing a general assignment of all errors arising from objection to the admission or rejection of testimony, as it is frequently almost impossible to point out all such errors in the motion for a new trial. But no such difficulty arises in regard to instructions. The statute requires them to be given in consecutively numbered paragraphs, and provides that they may be excepted to without

assigning a reason therefor. One of the objects of the statute was to enable a party objecting to an instruction to bring it to the attention of the court by number, and thus avoid the inconvenience of copying the same. In the early history of this state instructions were given orally, and if excepted to the party excepting was required to reduce the same to writing and preserve them in a bill of exceptions.

If such was the law at the present time a general assignment would be sufficient because an inspection of a bill of exceptions would show the errors complained of. But such is not the law, and if no objection is made to the instructions in the motion for a new trial, they need not and in fact should not be copied into the transcript. It is but justice to the trial court that objections to instructions be pointed out, and in our opinion the statute has not changed that requirement.

This court will construe the grounds in the motion for a new trial very liberally in order to prevent a failure of justice, but has no authority to waive assignments of error. The objections to the instructions therefore cannot be considered.

It is very clear that justice has been done and that the verdict is sustained by the weight of testimony.

Ingalls has filed a cross petition in error, in which he has assigned various grounds for setting the verdict and judgment aside, the principal one being that he was not permitted to recover special damages.

An examination of the petition will show that no facts are pleaded showing that he was entitled to such damages, hence there is no error in the exclusion of the same.

Ingalls claims damages by reason of the construction of the railroad on the public road for the distance of one mile on his land. One-half of this land was held by him as a timber culture claim, which he had entered on the 19th of April, 1875, and upon which he was required to cultivate and have growing thereon at the expiration of ten years

from the date of entry the number of trees required by the act of congress. The jury allowed no damages on this claim, and this is assigned for error. No injury to his possession was claimed or shown. A timber culture entry is made upon condition that the party entering the same shall comply with the law in setting out and cultivating the number of acres of trees and the number of trees per acre required. If he fail to do this, the entry will be subject to forfeiture or will lapse. The entry may be abandoned and the land entered by another. The United States cannot be joined as a party in a suit for damages so as to protect the railroad company or conclude the purchaser of land, as the title of the United States can be divested only in some of the modes provided in the statute. Until his title is complete therefore, a party who has entered the land cannot recover for damages to the land itself but merely for injury to his possession. As no such injury is shown, the verdict is right. There is no error in the record and the judgment is affirmed, the costs in this court to be taxed equally to the parties.

JUDGMENT ACCORDINGLY.

COBB, J., concurs.

LAKE, CH. J., dissents from the conclusion of the court referred to in the second clause of the syllabus.

DANIEL MCWILLIAMS, APPELLANT, v. MARTIN LAWLESS
ET AL., APPELLEES.

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17	124
15	131
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15	131
60	458
60	572

- 1. Contract for Sale of Real Estate: STATUTE OF FRAUDS.**
A memorandum of a contract for the sale of land which contains the names of the parties, the description of the property, the price, and refers to the ten-year terms of the seller as the terms of sale is sufficient.

2. **Principal and Agent.** Where an agent is authorized to make land contracts in his own name and bind his principal, a memorandum signed in the name of such agent by one duly authorized is sufficient.

APPEAL from Otoe county. Tried below before POUND, J.

Marquett, Deweese & Hall, for appellant, cited: *Brown* on Statute of Frauds, § 370. *Colman v. Garrigues*, 18 Barb., 66. *Underwood v. Hitchcox*, 1 Ves., Sen., 279. 1 Greenl. on Ev., § 268. *Morton v. Dean*, 13 Metcalf, 386. *Wright v. Weeks*, 25 N. Y., 153. *Poland v. O'Conner*, 1 Neb., *supra*. 2 *Parsons on Contracts*, 552. *Smith v. Finch*, 8 Wis., 245. *Horn v. Luddington*, 32 Wis., 75. *Pomeroy on Specific Performance*, § 165, *et seq.*, page 223.

M. H. Sessions and *T. B. Stevenson*, for appellees, cited: *Sugden on Vendors*, 193, 200, 201, 203, 205. *Barry v. Coombe*, 1 Pet., 640. *Bryant v. Boose*, 55 Ga., 438. *Hurley v. Brown*, 98 Mass., 545. *Hull v. Noble*, 40 Me., 549. *Gartrell v. Stafford*, 12 Neb., 545.

MAXWELL, J.

This is an action of ejectment brought by the plaintiff against the defendants to recover the possession of the east half of the south-west quarter of sec. 29, town 9, range 9 east, in Otoe county. On the trial of the cause a jury was waived and the cause tried to the court, which found in favor of the defendants and dismissed the action.

It appears from the record that on the 12th day of May, 1880, the defendant Lawless, by an agent, made a proposition to the B. & M. R. R. Co. to purchase said land as follows:

"Application to buy land in Nebraska of the Burlington and Missouri River Railroad Company in Nebraska,

McWilliams v. Lawless.

to be sent by first express with proper payment to land department for approval.

"LINCOLN, May 12th, A.D. 1880.

"Application is hereby made to purchase the east half of the south-west quarter of section twenty-nine, township nine, range nine east of the sixth principal meridian, in Otoe county, Nebraska, containing as per United States survey eighty acres, at \$9 per acre, on the following terms, to-wit: The ten years credit terms No. 1 of said Burlington & Missouri River Railroad Company in Nebraska, for the year 1880 as published by said company in its circulars and advertisements subject to taxes for the current year, and thereafter, and as fully set out in the regular land contract of said company, which contract I hereby agree to sign in duplicate as soon as the same is prepared.

"Make contracts in name of Martin Lawless. Contracts to Martin Lawless, at Lincoln, Neb.

"(*Applicant's signature*) MARTIN LAWLESS.

"By JOHN MCGINNITY."

Also the following attached to said application, "Sold by local agent 80 acres at \$9 per acre amounting to \$720, cash sent herewith as per local agent's receipt 710—\$20—30 days," etc.

The purchaser then received the following:

"Land Department of the B. & M. R. R. Co. in Nebraska.

"\$20. LINCOLN, NEBRASKA, May 12, 1880.

"Received of Martin Lawless twenty dollars as forfeit to guarantee the payment of the balance of the first installment of interest within 30 days from date with interest at 10 per cent per annum on E. $\frac{1}{2}$ of S. W. $\frac{1}{2}$, S. 29, T. 9, R. 9 E., at \$9 per acre—10 years credit.

"J. D. MCFARLAND,

"Land Commissioner.

"F."

Blank contracts in duplicate were also sent by the land

department to Lawless, and by him signed and returned. On the 7th of June, 1880, McGinnity for Lawless paid \$23.20 in addition to the sum formerly paid, being the first year's interest, and received the following receipt:

"Land Department of the B. & M. R. R. Co., in Nebraska.
"\$43.20. LINCOLN, NEBRASKA, June 7th, 1880.

"Received of Martin Lawless, forty-three and 20 hundredths dollars, being first payment of interest on application to purchase E. half, south-west quarter of section No. 29, town 9, range 9 east of the 6th P.M., according to our credit terms No. 1 as stated in said application.

"J. D. McFARLAND,
"Land Commissioner.
"By J."

Through the neglect of the person making the sale to Lawless no entry of the same was made on the books of the land department. On the 13th of May, 1880, Lawless leased the land for three years to one McGinnity, who took possession of and cultivated about 12 acres of said land and erected a stable thereon, etc. On the 2d day of June, 1880, the plaintiff purchased the land in controversy from the B. & M. Co., but the testimony shows that he had actual notice of the defendant's rights, and is not a *bona fide* purchaser.

On the evening of June 7th, the double sale was discovered. Thereupon a letter was sent to McGinnity as follows:

"LAND DEPARTMENT, BURLINGTON & MISSOURI RIVER
RAILROAD COMPANY IN NEBRASKA.

"LINCOLN, NEB., June 8th, 1880.

"J. D. McFarland, Land Commissioner. W. W. Peet,
Assistant Land Commissioner.

"John McGinnity, Esq., Palmyra, Nebraska:

DEAR SIR—We have just discovered an error on our part which seldom happens to us, but nevertheless did happen

this time. The E $\frac{1}{2}$, S. W. $\frac{1}{4}$ of 29-9-9 E, has already been sold to other parties and we cannot let your friend Lawless have it.

"We enclose a draft for \$43.20, amount received on his application.

"The mistake happened during an absence of the salesman, when other clerks not so well accustomed to that part of the work attended to it and made an oversight in this case, for which we are sorry. The reason we now decide in favor of the other parties is that they came here all the way from Wisconsin and went home satisfied that this land was theirs, while in the case of Mr. Lawless he has never seen the land and has not made a trip out here to select it, and will only be disappointed, but not out any traveling expenses.

"Acknowledge receipt. Yours Truly.

"J. D. McFARLAND,

"Land Commissioner."

"C. J. E."

Lawless and his agent refused to receive the draft. The testimony shows that all land contracts were signed in the name of the land commissioner, McFarland, and it is not denied that the person signing his name to the contract in question had authority to do so. In fact the testimony shows that he had such authority. The only question for determination therefore is, is the memorandum of the contract sufficient under the statute of frauds? The memorandum shows the names of the parties, the description of the land sold, the price, and provides in effect that the terms of payment shall be according to the ten-year term of the company. No particular objection has been pointed out to this memorandum, and in our opinion it contains all that the statutes requires. It is not necessary, where an agent entrusted with the sale of land as McFarland was in this case, should sign the name of his principal.

If he signs in his own name, parol evidence is admissible to show the agency and charge the principal on the contract. *Dykers v. Townsend*, 24 N.Y., 57. *Salmon Co. v. Goddard*, 14 How., 447-455. *Curtis v. Blair*, 26 Miss., 309-324. *Williams v. Woods*, 16 Md., 220. *McConnell v. Brillhart*, 17 Ills., 354. *Johnson v. Dodge*, Id., 443. *Williams v. Bacon*, 2 Gray, 387. *Merritt v. Clason*, 12 Johns., 102. 2 Smith's L. C. (6th Ed.), 316. The memorandum, therefore, was sufficient. The land department seems to have recognized the validity of the defendant's claim by assigning as a reason for giving the contract to the plaintiff, that he had come here from another state and had incurred considerable expense in so doing, while the defendant had been at no expense in purchasing the land. However meritorious such conduct may be as between individuals, legal rights are not to be determined in that manner. There is no error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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19 602

SAMUEL L. MARTIN AND OTHERS, PLAINTIFFS IN ERROR,
V. SIMON V. SEELEY, DEFENDANT IN ERROR.

Sheriff: LIABILITY FOR SERVICE RENDERED IN GUARDING PRISONER. Money received by a sheriff for keeping and guarding prisoners in a county, other than that in which he holds his office, is received by him officially; and his sureties will be liable on his official bond therefor to the person rendering the services.

ERROR to the district court of Adams county. Tried below before MORRIS, J.

Batty & Ragan, for plaintiffs in error.

Martin v. Seeley.

The sureties upon the bond of a sheriff containing the usual conditions that he will account for all moneys that may come into his hands as such sheriff, are liable only for moneys which their principal is authorized and bound by law to receive in his official capacity as sheriff—not for that of which he becomes the voluntary custodian. *People v. Pennock*, 60 N. Y., 421. *State v. Woodman*, 36 Ind., 511. *U. S. v. Boyd*, 15 Pet., 187. *Hill v. Kemble*, 9 Cal., 71. *Schloss v. White*, 16 Cal., 65. *Sample v. Davis*, 4 Iowa (Green), 117. *State v. Medary*, 17 Ohio, 554. *Collier v. Stoddard*, 19 Ga., 274. *Eaton v. Kelly*, N. C., 110. The sureties of a sheriff are liable only for acts done by him *virtute officii*, and not for acts done by him *colore officii*. *Huffman v. Kopplekom*, 8 Neb., 344.

A. H. Bowen and J. J. Whittier, for defendant in error, cited: *Berrien Co. v. Bunbury*, 45 Mich., 79. *King v. The U. S.*, 99 U. S., 231. *State v. Alden*, 12 Ohio, 62. *Cooley on Taxation*, 499, 500. *People v. Treadway*, 17 Mich., 483. *Brobst v. Skillen*, 16 Ohio State, 382. *State v. Liedtke*, 12 Neb., 174. *McDonald v. Atkins*, 13 Id., 568. *Huffman v. Kopplekom*, 8 Id., 344.

MAXWELL, J.

In 1880 and 1881, Seeley was sheriff of Buffalo county and the keeper of the jail of that county. In the same years, Martin was sheriff of Adams county, and had committed to his custody for safe keeping a number of prisoners, whom, there being no jail in Adams county, he caused to be imprisoned in the jail of Buffalo county. Seeley presented an account of the expenses of keeping said prisoners in the Buffalo county jail to Martin, the sum claimed being \$363.90. Martin thereupon copied Seeley's bill and presented it as his own account to the commissioners of Adams county, which account to the extent of \$343.65 was allowed and paid. Martin failed to pay over

to Seeley the money so received. Seeley thereupon brought an action against Martin and his sureties to recover the same. On the trial of the cause in the court below the court directed a verdict in favor of Seeley.

A large number of errors are assigned in this court which it seems to be unnecessary to notice in detail, as the only question for determination is, did Martin receive the money in his official capacity? That he did so receive it there is no question. Sec. 377 of the criminal code authorizes the sheriff of any county, when there is no secure jail in his county, to convey any person committed to jail to the jail of any county in the state and confine him there. Martin, therefore, in confining such persons as were committed to his custody for imprisonment in the jail of Buffalo county did so in his official capacity, and the money being received for such services his sureties are liable on his bond. The court did not err, therefore, in directing a verdict for Seeley. The judgment must be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

FRANK DENMAN, PLAINTIFF IN ERROR, V. THE STATE
OF NEBRASKA, DEFENDANT IN ERROR.

1. **Criminal Law.** An indictment for murder by striking with a knife is not objectionable for duplicity, by reason of stating that the accused made an *assault* and feloniously, etc., did strike the deceased and inflict a mortal wound, etc.
2. ———: **MURDER: DEFENSE.** Where a wound is the mediate cause of death, it is no defense that the immediate cause was erysipelas which set in in consequence of the wound.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

A. W. Field, for plaintiff in error.

Indictment is defective because of duplicity. 1 Bishop Crim. Proc., § 189. On instructions, cited: Dean's Med. Jur., 260. Wharton on Homicide, 244. 1 Wharton Crim. Law, § 751.

Isaac Powers, Jr., Attorney General, for the State, cited: *McAllister v. State*, 17 Ala., 587. *Parsons v. State*, 21 Id., 300. Wharton on Homicide, 241, § 382. *Commonwealth v. Fox*, 7 Gray, 585. *Harvey v. State*, 40 Id., 516. *Commonwealth v. Pike*, 3 Cush., 181. Russell on Crimes, 505 and 506.

MAXWELL J.

The plaintiff in error was indicted for murder in the second degree in the district court of Lancaster county, and convicted of manslaughter and sentenced to imprisonment in the penitentiary for nine years. He now prosecutes error to this court. The errors assigned are: *First*, duplicity in the indictment. *Second*, the exclusion of testimony showing the friendly relations between Denman and the deceased. *Third*, error in giving and refusing certain instructions.

Duplicity in an indictment is the joinder of two or more distinct offenses in one count. 1 Bish. Cr. Proc. (3-Edition), § 432. Whart. Cr. Proc. (8th Edition), § 243. The general rule is, that two distinct crimes cannot properly be joined in the same count of an indictment, and if so joined a motion to quash or demurrer will lie. Wharton Cr. Proc., § 243. But there are exceptions to the rule, as where the crime charged includes one of an inferior degree—as in murder which includes manslaughter. In such case the jury may acquit of the high crime and convict the accused of the less atrocious one. Id., § 246.

There are other exceptions to the rule, to which it is unnecessary to refer. Murder or manslaughter committed by an intentional blow includes an assault, not as a separate and distinct offense but as a part of the violence by which the murder was committed. 2 Bish. Cr. Pro., § 512. 2 Cr. Law, § 56. The substance of the charge against Denman in this case is that unlawfully and feloniously he did make an assault upon Coakley with a knife, with which he did strike and wound said Coakley on the arm, of which wound he died, etc. The indictment charges but one offense, viz., murder in the second degree, and the court did not err in overruling the motion to quash and the demurrer.

Second. Friendly relations between Denman and the deceased. Denman was a witness in his own behalf, and was asked by his attorneys, "What incident ever occurred between you and Mr. Coakley of a friendly nature?" Objection was made and no answer given. He was then asked if he had been on such friendly relations to the deceased that he (Coakley) had extended any material favors or acquaintance to him? Objection was again made, and no answer given. There was no offer to prove any fact, consequently no question is presented for determination.

Third. It appears from the testimony that one Coakley was keeping the St. Charles House, in the city of Lincoln, and that the plaintiff was boarding there; that on the fourth of July, 1881, Denman, while at dinner, made some disturbance, which resulted in Coakley ordering him to leave, and finally in putting him out of the house; that while on the sidewalk, whether at the door or a few steps from it, is not entirely clear, the plaintiff struck Coakley with a knife on the arm making a wound which extended to the bone. Erysipelas set in, and in two days afterwards Coakley died. The testimony is uncontradicted that the erysipelas resulted from the wound, and that the wound was the cause of death. The court gave the following instruction on behalf of the state, which is objected to: "If you find from the

evidence that the defendant inflicted a wound upon the person of Thomas Coakley, as charged in the indictment, then if such wound so inflicted by the defendant caused or directly contributed to the death of said Coakley, then the prisoner cannot be excused, because other causes may have also contributed to his death. If death ensues from a wound given in malice, but not in its nature mortal, but which from want of helpful applications, or from natural causes, develops a fever or an erysipelatous inflammation, and that fever or erysipelatous inflammation be the immediate cause of the death, yet the person who gave such wound cannot be thereby excused; for that the wound, though it was not the immediate cause of the death, yet if it is the mediate cause and the fever or erysipelatous inflammation is the immediate cause, the wound, being the cause of the fever or the erysipelatous inflammation, is the cause of the immediate cause, and the person who inflicted such wound is responsible for the result of such wound according to the circumstances of the case."

This is equivalent to saying, that if the wound was the mediate cause of death—that is, if but for the wound death would not have ensued, it is no defense that because of the wound fever or erysipelas set in and was the immediate cause of death. No objection is pointed out to this instruction, and there was no error in giving it. *McAllister v. The State*, 17 Ala., 434. *U. S. v. Warner*, 4 McLean, 464. *Com. v. Hackett*, 2 Allen, 137. *Com. v. McPike*, 3 Cush., 181. *Parsons v. The State*, 21 Ala., 300. 2 Wharton Cr. Law, § 941.

The following instruction was asked and refused: "If the jury find from the testimony that the defendant inflicted on the deceased a slight wound, in itself not dangerous, which wound by improper treatment of a physician became mortal, you will acquit the defendant." There is not a particle of testimony in the record tending to show that the physicians improperly treated the wound. The instruction

was therefore properly refused. Other instructions were asked on behalf of the prisoner, and refused, to which it is unnecessary to refer, as we find no evidence in the record to justify them. Objection is made in the brief that the verdict is not sustained by the evidence. We have carefully read the evidence, and are of the opinion that the verdict is right. There are no material errors in the record and it is clear that justice has been done. The judgment must therefore be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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JOSEPH SHAWANG, PLAINTIFF IN ERROR, V. SARAH J.
LOVE, DEFENDANT IN ERROR.

Error or Appeal: WAIVER. A party taking an appeal from, or filing a petition in error to, the district court thereby submits himself to the jurisdiction of said court, and waives any errors which have intervened in the service or return of process necessary to bring him within such jurisdiction.

ERROR to the district court for Richardson county.
Heard below before WEAVER, J.

A. Schoenheit, for plaintiff in error.

Martin & Gilman, for defendant in error.

COBB, J.

This was an action of ejectment by the defendant in error against the plaintiff in error. The defendant in the court below made default, and upon proofs a judgment was ren-

dered for the plaintiff therein. Thereupon the cause is brought to this court by petition in error.

The following errors are assigned:

"1. The district court did not obtain jurisdiction against the said Joseph Shawang in said cause.

"2. The said Shawang was not served by summons or other process of the pending of said action as required by law.

"3. The record shows that the summons was served upon said Shawang on the return day thereof and not as required by law.

"4. The record shows that the return of the summons was made one day after the return day.

"5. The record does not show what service of summons was made within the jurisdiction of the officer making it.

"7. The record shows that at the date said judgment was rendered by the court it was not at a legally constituted term or adjourned term of said district court, and said court had no jurisdiction to render said judgment."

These alleged errors are all jurisdictional, and all except the seventh are objections to the jurisdiction of the court over the person of the plaintiff in error. I understand the law to be well settled that the taking of an appeal or the suing out of a writ of error is a waiver of all errors of want of jurisdiction of the person of the party. In other words, the party taking an appeal or suing out a writ of error thereby submits himself to the jurisdiction of the court. Such is the holding of the supreme court of Ohio in *Adams Express Co. v. St. John*, 17 Ohio State, 641. See also opinion of this court in *Brondberg v. Bobbett*, disposed of at the present term. 14 Neb., 517.

As to the seventh point, a careful examination of the record fails to disclose that the said district court was not legally in session, and the point not being referred to in the brief of plaintiff in error we are at a loss to perceive upon what that assignment is founded.

This being an action such as is mentioned in section 630 of the civil code, all that the plaintiff in error had to do to obtain a new trial was to demand it at the same term of court at which the trial was had. Having failed to make such demand, I do not think that he would be entitled to a new trial in any event, without a satisfactory showing why such demand was not made. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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SAMUEL G. MCCATHRON, PLAINTIFF IN ERROR, V. JOHN G. MCCATHRON ET AL., DEFENDANTS IN ERROR.

1. **A Bill of Exceptions**, though agreed to by the attorneys of both parties by stipulation, unless settled and signed by the judge or clerk, will be quashed on motion.
2. **Practice in Supreme Court**. Where the only objection to the judgment is, that the verdict is not sustained by the evidence, and for any cause the bill of exceptions be quashed or stricken from the files, the judgment will be affirmed.

ERROR to the district court for Merrick county. Tried below before GEORGE W. POST, J.

O. A. Abbott, A. L. Renoehl and J. Patterson, for plaintiff in error.

W. H. Webster, for defendants in error.

COBB, J.

This case comes up on motion of the defendants in error to quash the bill of exceptions for the reason that the same had not been allowed or signed by either the judge or clerk of the trial court.

Upon examination of the record it appears that although there is a stipulation signed by the attorneys on either side agreeing upon the bill of exceptions, yet it does not appear that it was ever presented either to the judge or clerk, and certainly it bears the signature of neither of them.

The statute, sec. 311, civil code, provides for the presentation to and settlement and allowance by the trial judge of bills of exceptions, the time in which the same must be presented, etc., and continues as follows: "In case of the death of the judge, or when it is shown by affidavit that the judge is prevented by sickness or absence from his district, as well as in cases where the parties interested shall agree upon the bill of exceptions (and shall have attached a written stipulation to that effect to the bill), it shall be the duty of the clerk to settle and sign the bill in the same manner as the judge is by this act required to do; and shall thereupon be filed with the papers in the case, and have the same force and effect as though signed by the court."

These provisions are very liberal, and it seems that they might be complied with by any party desiring to bring his cause into this court for review. But when there is a manifest failure to comply with their plain requirements and the point is made and insisted upon by the opposite party, nothing remains for this court but to decide accordingly. Upon the announcement of such decision by the court, and the bill of exceptions being quashed, the cause was submitted generally.

Upon examining the record I find that no point is made which can be considered in the absence of a bill of exceptions; the only substantial point being that "the verdict is not sustained by sufficient evidence." The judgment of the district court must therefore be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JOHN K. ROODE, PLAINTIFF IN ERROR, 7. MARTIN
SHERER, DEFENDANT IN ERROR.

Practice in Supreme Court. The paper claimed to be a bill of exceptions being quashed, and there being no point raised or question involved in the case, which can be considered without an examination of the testimony on which the judgment was rendered, the judgment must be affirmed.

ERROR to the district court for Jefferson county. Tried below before WEAVER, J.

John K. Roode, pro se.

Brown & Ryan Brothers, for defendant in error.

COBB, J.

In this case there was a trial and judgment for the defendants Sherer & Brown in the court below. The plaintiff brings the cause to this court by petition in error. No service of summons in error was made on Brown. The defendant in error (Sherer) moved to quash the bill of exceptions, assigning five causes as follows:

"1. Because the pretended bill of exceptions was never certified as required by law.

"2. Because the pretended bill of exceptions was never served upon either of the defendants in error or anyone else as required by law.

"3. Because the so called bill of exceptions is not authenticated as required by law.

"4. Because the only pretended authentication to said bill of exceptions so called, is the signature of the plaintiff in error thereto.

"5. Because there is nothing to show that the pretended bill of exceptions contains all the evidence introduced or offered on the trial of said action."

An examination of the record verifies all of the above charges against the bill of exceptions to be well founded; and the court having sustained the said motion and ordered the said bill of exceptions quashed, the cause was submitted generally. Upon a careful examination of the record I find no point made or ground of error set out which can be examined or considered in the absence of a bill of exceptions. The record presents a case identical with that of *McCathron v. McCathron*, ante p. 144, except that in this case there was no agreement or stipulation of counsel as to the paper claimed to be a bill of exceptions; the petition in error sets out no point of error which could be considered with or without a bill of exceptions, and there appears to have been no motion for a new trial in the case. Nothing remains therefore possible for this court but to affirm the judgment. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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23	608

THE STATE OF NEBRASKA, EX REL. HENRY T. CLARK,
v. JOSEPH SCOTT, COUNTY TREASURER OF BUFFALO
COUNTY.

Mandamus against County Treasurer: INTEREST. In a proper case, a mandamus will issue to compel a county treasurer to pay out the county money of the appropriate fund, upon a county warrant, according to its face, together with interest thereon according to the date of its presentation for payment as endorsed thereon, and the law in force at the date of such payment. But will not issue, to compel the payment of a higher rate of interest, as evidenced by the terms of a judgment against the county, and in favor of the holder of said warrant, and in liquidation of which such warrant was issued.

CLARK recovered judgment in this court in 1878 against the commissioners of Buffalo county on a mandamus to compel them to levy a tax and to draw warrants thereon, and deliver the same to him through the clerk until the full sum of \$19,577.50 and interest thereon at ten per cent per annum from June 11th, 1873, should be fully paid. In obedience to this mandate levies were made and warrants issued to liquidate said judgment for the years 1877, 1878, 1879, 1880, and 1881. In 1879 the legislature reduced the rate of interest on county warrants from ten to seven per cent. The county treasurer having paid certain of these warrants, issued since the law reducing the interest, with interest only at the rate of seven per cent, this application for a peremptory writ of mandamus was brought to compel him to pay an amount equal to ten per cent interest.

J. R. Webster, for the relator, cited: *Laws* 1879, 113, § 3. *Fuller v. Heath*, 89 Ills., 296. *Bensen v. Carmel*, 8 Greenleaf, 112. *Willey v. Greenfield*, 30 Me., 452. *Goldschmiedt v. New Orleans*, 5 La. Ann., 436. *Short v. New Orleans*, 4 La. Ann., 281. *Pease v. Cornish*, 19 Me., 191. *Varney v. Nobleborough*, 2 Greenleaf, 121.

E. M. Cunningham, for respondent, cited: *Freeman on Judgments*, § 463, 432a. *Lyon v. Northrop*, 17 Iowa, 314. *Webster v. Clark*, 37 Mo., 572. *Wethersby v. Munn*, 11 Johns., 518. *Ives v. Phelps*, 16 Minn., 451. *Morris v. Harvey & Williams*, 75 Va., 726. *Dalrymple v. Whittingham*, 26 Ver., 345. *White v. Young*, 38 Ills., 159. *Louden v. Birt*, 4 Ind., 570. *Kern v. Yountman*, 8 Ind., 254. *Parsons on Notes and Bills*, p. 30.

COBB, J.

The answer of the respondent is a complete defense to the cause of action as set out in the relation. Whatever legal or equitable rights the relator may have as against

Buffalo county, of which we express no opinion, it is very clear that the respondent is not in default. The respondent being merely a ministerial officer, is charged with no knowledge but that to be derived from an inspection of the warrants themselves. Such inspection conveys no information as to the consideration for which they were issued. They bear date the 25th June, 1880, and call for the payment of five hundred dollars each out of the bridge fund. By turning to the back it is seen that they were presented to the then county treasurer, and not paid for the want of funds, on the 21st day of August, 1880, and registered for payment the same day. The word interest is not found either on the back or face of the warrants. Clearly it is the duty of the county treasurer, upon the coming into the treasury of money sufficient and the re-presentation of the said warrants, to pay the same together with interest according to terms of the law in force at the time. No question as to the power of the legislature to reduce the rate of interest on county warrants after their issue can possibly arise in this case, because there has been no such act passed since the issuance of these warrants. It cannot be that it is the duty of the county treasurer to study the history of every warrant that is presented for payment, and acquaint himself with the consideration upon which it was issued, or that it is the duty of the courts to punish him by mandamus for a mistake or error of judgment as to the legal relations existing between the claimant and the county. The warrant itself is the treasurer's authority for paying out the money and it only will be accepted as his voucher by the auditing board. Can this court compel him to disburse money upon a disputed interpretation of a record which has not been and cannot be legally brought before him, and which in no event would the auditing board accept as a voucher? We think not. The writ must therefore be denied.

WRIT DENIED.

THE other judges concur.

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WILLIAM KERKOW, JOHN ERB, AND AUGUST ENGLISH,
PLAINTIFFS IN ERROR, V. FREDERIKA BAUER ET AL.,
DEFENDANTS IN ERROR.

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1. **Pleading:** PETITION. The petition, *Held*, To state facts sufficient to constitute a cause of action against the defendants in favor of the plaintiffs.

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2. **Liquor Selling:** ACTION BY WIDOW AND CHILDREN. Under the code system of pleading and the provisions of the statute now in force, known as chapter 50, Compiled Statutes, an action can be maintained by the widow and infant children, jointly or severally, whose husband and father has lost his life in consequence of intoxication, against any and all persons, jointly or severally, who sold, gave, or furnished any intoxicating liquor which was drank by him on the day or about the time of such intoxication.

3. ———: ———: EVIDENCE. On the trial of such case it is competent to prove the physical condition and health of deceased, his habits of industry, his avocation, the monthly or annual product of the same, and whether any and all of the plaintiffs are of such tender age as to render them entirely dependent upon their parents for support.

4. ———: ———: CONSTRUCTION. The word "beer," without restriction or qualification, denotes an intoxicating malt liquor, and is within the meaning of the words "intoxicating liquors" as used throughout the statute.

5. ———: ———: EVIDENCE. This class of actions is brought for the loss of support, not for the loss of the society or companionship of deceased; hence, proof of the lack of affection, sympathy, or respect for deceased on the part of the adult plaintiff, is inadmissible.

6. ———: ———: INSTRUCTIONS TO JURY. There being evidence tending to prove that the deceased was intoxicated on the fatal day, and it being contended on the part of the defendants that he was not intoxicated, notwithstanding such evidence, because they had not sold him enough liquor to make him intoxicated, *Held*, That it was not error on the part of the court to instruct the jury that "it was not necessary on the part of the plaintiffs to prove that the defendants sold all the liquor to the said John Bauer that may have produced his intoxica-

Kerkow v. Bauer.

tion," etc., nor to allow counsel for the plaintiffs to urge to the jury that, rather than reject the evidence before them of the intoxication of the deceased, they might presume that he obtained and drank liquor elsewhere which also contributed to his intoxication.

7. ———: ———: ———. Evidence offered by defendants to prove that on the fatal night, on account of its unusual darkness, another person in that vicinity lost his way, and still another had great difficulty in keeping it; also, that deceased had on a former occasion, on a bright moonlight night, lost his way, etc., was properly rejected.
8. ———: ———: ———. The evidence in the case, *Held*, Sufficient to sustain the verdict.
9. Trial: INSTRUCTIONS. When, upon a trial, a party presents an instruction consisting of four propositions, each perfect in itself, with a fifth one reiterating and emphasizing the said propositions, it is not error on the part of the court, having given the four propositions in charge to the jury, to detach and refuse to give the fifth one, without regard to the law of such proposition, or its applicability to the facts of the case.

ERROR to the district court for Dodge county. Tried below before GEORGE W. POST, J.

E. F. Gray, for plaintiffs in error, cited: *Shugart v. Eagan*, 83 Ill., 56. *Krach v. Heilman*, 53 Ind., 526. *Schlosser v. The State*, 55 Ind., 82. *Klare v. The State*, 43 Ind., 483.

William Marshall, for defendants in error, cited: *Roth v. Eppy*, 80 Ill., 286. *People v. Wheelock*, 3 Parker (N. Y.), 14. *The People v. Hawley*, 3 Mich., 339. *Binford v. Johnson* (Ind.), 22 Am. Law Reg., 50. *Roose v. Perkins*, 9 Neb., 312. Sackett on Instructions, 181 and 182.

COBB, J.

The defendants in error are the widow and infant children of one John Bauer, who, one dark night in October 1881, drove his wagon off a bluff of Pebble creek, in Dodge

county, where, a few days afterwards, his dead body was found under his overturned wagon, and his two drowned horses in the creek. The plaintiffs in error are the liquor dealers of Scribner, in the said county, who sold him liquor on the day of the occurrence, which, it is alleged, made him intoxicated and caused him to lose his way from Scribner to his home and drive off the bluff into the creek, with the fatal consequences above stated. There was a trial to a jury in the district court, and a verdict and judgment for the plaintiffs below for eighteen hundred dollars and costs. The cause is brought to this court on error.

There are twenty-two errors assigned in the petition in error, some of which are merely formal and will not need to be noticed separately, but those which present substantial points will be considered in their order.

"1. That the facts set forth in the said petition of the defendants in error are not sufficient in law to maintain the aforesaid action against the plaintiffs in error."

Chapter 50 of the Compiled Statutes, after providing for the granting of license for the sale of malt, spirituous, and vinous liquors, when properly applied for and deemed expedient, the giving of bonds by the licensed persons, etc., proceeds as follows:

"SEC. 11. Any person who shall sell or give away, upon any pretext, malt, spirituous, or vinous liquors, or any intoxicating drinks, without having first complied with the provisions of this act and obtained a license as herein set forth, * * * * shall be liable in all respects to the public and to individuals, the same as he would have been had he given bonds and obtained license as herein provided.

"SEC. 15. The person so licensed shall pay all damages that the community or individuals may sustain in consequence of such traffic, he shall support all paupers, widows, and orphans, and the expenses of all civil and criminal prosecutions growing out of or justly attributable to his traffic in intoxicating drinks, etc.

"SEC. 16. It shall be lawful for any married woman or any other person at her request to institute and maintain in her own name a suit on any such bond for all damages sustained by herself and children on account of such traffic, etc.

"SEC. 18. On the trial of any suit under the provisions hereof, the cause or foundation of which shall be the acts done or injuries inflicted by a person under the influence of liquor, it shall only be necessary, to sustain the action, to prove that the defendant or defendants sold or gave liquor to the person so intoxicated or under the influence of liquor, whose acts or injuries are complained of, on that day or about that time when said acts were committed or said injuries received," etc.

The petition is in the usual form, as applicable to the former statute. And while it doubtless contains several allegations which the changes in the law have rendered unnecessary, I think that it contains all that are essential; at least, in the absence of specific grounds of objection, we must hold it to be sufficient.

"2. That the said court erred in sustaining the demurrer of these defendants in error to the second ground of defense," etc.

"3. That the said court erred in sustaining the demurrer of these defendants to the answer of each of these plaintiffs in error, alleging misjoinder of parties defendant."

The above two points may be properly considered together, considering the allegation of the petition that the defendants were, at the time of the selling complained of, engaged in business in the retail traffic in intoxicating liquors, in the village of Scribner, each for himself, which negatives the idea of the act of selling being a joint one. Were we to apply the rules of pleading which existed before the adoption of the reformed or code system, we would probably hold that the demurrer should have been overruled or held to reach back to the petition as the first de-

fective pleading. But we cannot apply the common law rules of pleading to this case. While the law provides for licensing the sale of intoxicating liquors, it regards the making of a person intoxicated, or the selling or furnishing a person intoxicating liquors with which he makes himself intoxicated, as a tort or wrong, and holds such person so selling or furnishing responsible for certain of the consequences of such intoxication. And to provide against the difficulty, or rather impossibility, of proving whether it was the first, middle, or last drink that caused the intoxication the statute provides that, in such cases, "it shall only be necessary, to sustain the action, to prove that the defendant or defendants sold or gave liquor to the person so intoxicated or under the influence of liquor, whose acts or injuries are complained of, on that day or about that time when said acts were committed or said injuries received." While this statute does not in terms state what it will be necessary to plead or allege in such case, yet, when we consider the object and office of pleading, we must regard the provision of the section as applying as well to the pleading as to the proof. If I am correct in this view, then it made no difference that each of the defendants was doing business for and by himself, and sold each his separate glass of liquor to the deceased as his individual act in which the other two defendants had no interest. While the act of each defendant in selling the liquor was his own individual act, yet the law makes them in certain contingencies jointly interested in and responsible for the intoxication caused thereby. And it was only necessary to allege and prove the fact of selling or furnishing intoxicating liquors by the defendants to the deceased on, or about the day of his intoxication. Had the plaintiffs failed to prove such selling, or furnishing by each of the defendants, then such defendant or defendants would have been entitled to a judgment in his favor; but such acquittal would have had no effect upon the other defendants except to enlarge their responsibility.

"4. That said court erred in admitting the evidence on the part of these defendants in error to which the plaintiffs objected."

Upon the examination of the adult plaintiff as a witness in her own behalf and that of the infant plaintiffs, she was permitted to answer the following questions, put to her by plaintiffs' attorney over the objection of the defendants:

1. What was his physical condition, as to health?
2. Was he a good or a bad farmer?
3. How well did he provide for his family?
4. How much did he produce or earn each year?
5. State whether any of the children are large enough or old enough to contribute to the support of the family.

Plaintiffs, in their brief, do not point out wherein this evidence is objectionable, and I fail to see that it is so. This action is brought for the loss of the support which would otherwise have been supplied them by the husband and father. The extent of such loss could only be measured by the character and value of the services of the deceased in his avocation while living. And as to question numbered five, the value of such support to the children would depend, in some degree at least, upon their inability to support themselves.

The witness John Bauer, upon his direct examination on the part of plaintiffs below, was allowed to answer the following question over the objection of the plaintiffs in error.

Q. If a man takes enough of it, will it intoxicate?

This question was asked in reference to the beer which had been furnished to deceased and witness by the defendant English, and drank by them.

Beer, as defined by Craig in his dictionary, is "a fermented liquor made from the malt of barley, and flavored with hops. It may be called the wine of barley. A variety of kinds are made; those in use at present are distinguished by the names of ale, porter, or strong beer, table beer, and small beer, which differ little except in strength

and the mode of preparation in their manufacture." Beer, then, is a malt liquor, as much as whiskey is a spirituous, or port wine a vinous liquor. In the eleventh section of the act, malt, spirituous, and vinous liquors are classed together as intoxicating drinks, and their sale without license forbidden under severe penalties. And by the act approved Feb. 28, 1881 [Comp. Stat., chap. 50, § 31], beer is classed with wine and other intoxicating liquors, and the treating to them in saloons, or other public places, and the accepting of such treats, prohibited under penalties. By these acts, I consider the question of the intoxicating qualities of "beer" as settled. The question was therefore unnecessary, and hence the ruling erroneous. But at most it was error without prejudice.

"5. That the said court erred in ruling out the evidence offered by the plaintiffs in error on the trial of said cause, to which rulings they excepted."

While Frederika Bauer was on the stand as a witness in her own behalf and that of her children, the other defendants in error, she was cross-examined by the attorney for plaintiffs in error, by whom she was asked the following question:

Q. State if Albert Bleihl, or John Bauer, or one of them, Sunday morning, when they come to report at your house that your husband was dead, if one of them did not ask you if they should bring the body home, and if you did not answer substantially this: "No, I won't have him there," or "I would not have him there"?

Upon this question being objected to as immaterial by plaintiffs' counsel, defendants' counsel offered to show by the witness that she did not during the lifetime of her husband and not until this suit was brought and perhaps does not now estimate the value of her husband's support or his life at anything. He also offered to show that she not only refused to have the body brought home, not only refused to attend the funeral, but would let no one else of the fam-

ily attend it; not only that the funeral was had on account of her action at another place and by parties comparatively indifferent to the deceased, on this account, but that prior to his death she said she wished he would die, or statements that amounted to that; and that immediately after his death, when, as counsel remembers now, she was informed of his death, that at that time she expressed herself not as sorry for his death but only for the loss of the team—or words to that effect; and that still subsequent to that time she said, in so many words, that she was glad that he was dead, and that she was only sorry that he died in that way. To which offer the plaintiff objected as immaterial. Objection sustained, and defendants excepted. This offer was again made in substantially the same form, and the testimony being again objected to by plaintiffs' counsel as irrelevant and incompetent, the objection was by the court overruled. But had this not been done, we could not have found error in the keeping out of the testimony offered. The right of action in this class of cases depends in no degree upon sentiment. Affection for the deceased on the part of one or all of the plaintiffs could neither add to, nor the want of it take from, the amount of the verdict, if they are entitled to one. That should be the *real* value of the support which has been lost in the death of the husband and father, not the value at which such support may have been estimated by one or all of the plaintiffs.

"6. That said court erred in giving to the jury each of the instructions asked for by these defendants in error which are numbered 1, 2, 3, 4, and 5."

The following are the instructions complained of:

"1. The court instructs the jury that this is a civil action of the plaintiffs against the defendants jointly for damages which the plaintiffs claim to have sustained as the result of drinking intoxicating liquors, which plaintiffs claim to have been sold to and drank by John Bauer, the husband of Frederika Bauer and the father of — Bauer

et al., which liquors plaintiffs claim were sold by said defendants.

"2. If from the evidence you find that the said John Bauer bought and drank intoxicating liquors at various places and from various persons, including all of the defendants, on the thirteenth day of October, 1881, and that he on that day became drunken from the combined effect of such liquor, and that on that day he died or was killed as the consequence or effect of such intoxication, then all of these defendants are jointly liable.

"3. The jury are further instructed that though they may believe from the evidence that the deceased had bought or taken liquor at places other than at the saloons of the defendants, still this fact would constitute no defense to this action, provided the jury believe from the evidence that the deceased obtained intoxicating liquor at the saloons of the defendants which contributed to his intoxication, and that his death resulted as a consequence of such intoxication.

"4. The court instructs the jury that, if from the evidence they believe that on the day of the death of said John Bauer he became intoxicated and that by reason of such intoxication he came to his death, it shall only be necessary, in order to hold the defendants liable, to prove that they sold intoxicating liquors to the said John Bauer at a time when the drinking of such liquor so sold (if any) tended to produce said intoxication or that contributed to such intoxication.

"5. The court further instructs the jury that, in this case it is not necessary on the part of the plaintiffs to prove that the defendants sold all the liquors to the said John Bauer that may have produced his intoxication, if he was intoxicated. It is sufficient if it is proved that they sold him intoxicating liquor that contributed to such intoxication, and that such intoxication resulted in his death."

The chief if not the only objection to these instructions

on the part of the plaintiffs in error, as pointed out in the brief of counsel, is, what is therein styled "these continuing suggestions from the court to the jury that they might believe from the evidence that the deceased had bought or taken liquor at places other than at the saloons of the defendants," etc. And we will probably save time by considering also in this connection the objections numbered 9, 10, and 11, as follows:

"9. That the said court erred in permitting the attorney of the defendants in error, over the objection of the plaintiffs in error, on the trial of said action, to urge, suggest, and argue to the jury that if the beer it was shown by the evidence the deceased, John Bauer, had got of the plaintiffs in error on the thirteenth day of October, 1881, was not sufficient to cause him to be intoxicated at the time of the accident resulting in his death, he must have got intoxicating liquor somewhere else, of other parties than the plaintiffs in error; and the said court erred in overruling the objection of the plaintiffs in error to said argument, suggestion, and urging; and as well, said court erred in giving his sanction of said argument, suggestion, and urging before the jury."

Under the other two numbers the said objection is twice repeated in somewhat different language; but I think the point is sufficiently apparent without setting them out more at length.

There was evidence tending to prove that the deceased was intoxicated on the evening of the day both shortly before and immediately after his starting for his home. He was proved to have drank four or five glasses of beer and one or two glasses of cider that afternoon. When about ready to start home, he went with the witness Albert Bleihl to the bar of August English, one of the plaintiffs in error, and called for beer for himself and witness. Mr. English refused to let him have it, for the reason that "he had got enough." It was also proved that, as he started to drive

on the road towards home, he drove and acted like an intoxicated man. Yet it was no doubt argued and contended for there, as it is here, by counsel for plaintiffs in error, that deceased was not intoxicated on the fatal night because he had not drank enough to intoxicate him; that four or five glasses of beer and a glass or two of cider were not sufficient to intoxicate a robust, healthy man as deceased was shown to have been. I fail to see that it was an unfair argument on the part of counsel for defendants in error to make to the jury that, rather than reject all of this evidence of the actual state of intoxication of the deceased, they should presume that he must have obtained and drank liquors elsewhere than that proved. Nay, I think that such a conclusion would arise in every mind. Here is a man evidently intoxicated, as evidenced by his looks, action, and speech. "But," says an objector, "he cannot be intoxicated, he has only drank five or six glasses this afternoon, and that could not intoxicate a strong man like him." Some might say, "that depends upon many subtle conditions; the state of his nervous and bilious system, the regularity of his meals, sleep, digestion, and many other things appertaining to the man, and many others appertaining to the liquors drank, whether all of the same brewage or distillation or of different ones," etc. But the great majority of minds would immediately revert to the great improbability of the witnesses, or anybody having knowledge of all the opportunities afforded by any village or city to a person whose appetite has already been stimulated by numerous libations, for further indulgence. And to draw the inference from facts already proved that other facts, though not proved, must exist by force of logical sequence is not, as I understand it, an abuse of the privileges of debate in a trial court.

In regard to the instructions objected to in this connection, I think the court laid down the law correctly, and that the instructions were necessary to give the jury a

knowledge of their duty, and were not suggestive of any right on their part, to consider facts not proven.

No. 12 of the petition in error is as follows: "The said verdict is not sustained by sufficient evidence and is contrary to law." With this objection we will also consider the 15th. "That the court erred in excluding from the jury the evidence given by F. A. Allerman, a witness for the plaintiffs in error, and the said court erred in refusing the offer of evidence from this same witness made by these plaintiffs in error to prove that the deceased John Bauer was liable to get lost at any time, when it was light or dark, and when not intoxicated or drinking;" also No. 16. "That said court erred in refusing the offer of these plaintiffs in error to prove by Chris. Dahms and John Cum-snider, that the last named witness at the same time of the accident that resulted in the death of said deceased, John Bauer, being on his road home from Scribner as deceased was, lost his way and wandered a mile from his road and was compelled to stay overnight at the house of the first above-named witness because of the darkness of the night;" also, No. 21. "That said court erred in sustaining the objection of the defendants in error to the question of the plaintiffs in error put to Aug. Shultz as follows, to-wit: State whether or not you had any trouble to follow the road (referring to a road in the vicinity of Scribner), on the night that the accident occurred that resulted in the death of John Bauer?"

The witness F. A. Allerman was sworn on the part of plaintiffs in error, and, having stated that he resided about five miles west of Scribner and about four miles north-west of the late residence of the deceased, and had known him for about eight years previous to his death, his examination proceeded as follows:

Q. Do you remember of seeing the deceased, John Bauer, about a year ago?

A. Yes, sir.

Q. At that place, I mean?

A. Yes, sir.

Q. What time of day or night was it?

A. It was about midnight.

Q. How came he to be there; what were the circumstances?

A. Well he called me out of bed, and said he had lost his road, and wanted to know where he was.

Q. What kind of a night was that?

A. It was a bright, moonlight night.

Q. Where did he say he was coming from or going to?

Plaintiff objects as immaterial. The defendants offer to show that the deceased was liable to get lost at any time, whether it was a light or dark night; and further offers to show that he had not drank anything at that time.

Plaintiff objects as before. Sustained and defendants except. Plaintiff objects to the testimony already given by witness, as immaterial, and asks that it be stricken from the record. Sustained and defendants except.

There was no question that it was a dark night. Two or three of the plaintiffs' witnesses testified to that. But, had it been deemed necessary to prove the character of the night more definitely, that could doubtless have been done by direct testimony. I do not think narratives of the experiences or observations of witnesses on the night in question could be received for that purpose. Says a standard author on the law of evidence; "Great latitude is justly allowed by the law to the reception of indirect or circumstantial evidence, the aid of which is constantly required, not merely for the purpose of remedying the want of direct evidence, but of supplying an invaluable protection against imposition. The law interferes to exclude all evidence which falls within the description of *res inter alios acta*, the effect of which is, as will presently be seen, to prevent a litigant party from being concluded or even affected by the evidence, acts, conduct, or declarations of strangers.

And this rule is to be regarded to a great extent, at least, not so much as a limitation and restraint of the natural effect of such collateral evidence, but as a restraint limited by and co-extensive with the very principle by which the reception of such evidence is warranted; for the ground of receiving such evidence is the connection between the facts proved and the facts disputed; and there is no such general connection between the acts, conduct, and declarations of strangers as can afford a fair and reasonable inference to be acted on generally, even in the ordinary concerns of life, still less can they supply such as ought to be relied on for the purpose of judicial investigation." Starkie on Evidence, 10 Ed., 81. As to the offer to prove by the witness, F. A. Allerman, that the deceased was liable to get lost at any time, whether it was a light or a dark night, and to show that he had not drunk anything at that time, if it is true that the deceased was deficient in the capacity to find his way either by day or night, and such incapacity was material to the question on trial, it could, I think, be shown by the testimony of a witness or witnesses well acquainted with him, and who from frequent opportunities of observation, had matured a judgment of deceased's abnormal want of capacity in that regard; but it will scarcely be seriously contended that one instance of a man becoming lost, or losing his road in the night time, either in the woods or on the prairie, is sufficient to give him a settled character as an imbecile in that regard. But the character or capacity of the deceased to find his way, or his abnormal capacity to lose his way when sober, were not material to the issue before the jury. The law which gives its sanction to the sale of intoxicating liquors makes no distinction among the persons to whom the same may be sold, except that they may not be sold to minors, apprentices, Indians, insane persons, idiots, or habitual drunkards; but it says to the seller, by engaging in this traffic you assume a fearful responsibility. You assume to pay all damages

that the community or any individual may sustain in consequence of such traffic. They of all men know that intoxicating liquors affect no two persons exactly alike. In the case of some persons, it brings out passions and qualities scarcely possessed by them in a state of sobriety; in others, it intensifies those most prominent in their natural condition. So, in the case at the bar, if it were true that the deceased was scarcely able to find his way home when sober, and only by calling in the friendly offices of his neighbors to tell him where he was and put him on his way, then it only lacked the slight intoxication of a few glasses of beer and cider to render him quite incapable. But the vendors of this intoxicating liquor are just as responsible under the law for the consequences of this incapacity, as though, when in a state of entire sobriety, deceased had possessed the path-finding capacity of Kit Carson himself.

Having examined with interest the ingenious theory of the casualty, as contained in the brief of plaintiffs in error, I agree that a sober man in the darkness of that night might have mistaken the north line of posts on Mr. Witts' farm for the south line, and might also have mistaken the willow fence or hedge for the plum thicket near the bridge; but here, a sober man not finding the bridge would have stopped, while one whose sense of time, space, and direction was bewildered by intoxication, might drive the distance which the deceased is shown to have followed the creek, before driving over the bank. All of this was before the jury, and I do not think any one can say, certainly not I, that they reached the conclusion they did through the influence of passion or prejudice, or that their verdict is contrary to the law, or unsustained by the evidence in the case.

It only remains to consider points seven and eight of plaintiffs in error's petition in error, which are as follows:

"7. That said court erred in refusing to give to the

jury each of the instructions asked for by the plaintiffs in error, which are numbered 3, 4, and 6."

"8. That said court erred in tearing off and refusing to give to the jury the last part of instruction numbered 1, asked for by plaintiffs in error, as follows, to-wit: 'And unless you find each and all of these four propositions to be established by a preponderance of evidence, it will be your duty to return a verdict in favor of the defendants.'"

Instructions numbered 3, 4, and 6, asked for by the defendants in the court below and refused by the court, are as follows:

"3. Any defendant that is not shown by a preponderance of the evidence to have, on the thirteenth day of October, 1881, sold or given intoxicating liquor to the deceased in quantities sufficient to produce intoxication, or when the deceased was under the influence of liquor, is entitled to a verdict in his favor.

"4. Unless you find from a preponderance of the evidence that the deceased, at the time of missing his road and driving down to the creek where his death occurred, was then in a state of intoxication, it will be your duty to return your verdict in favor of the defendants.

"6. If from the evidence you believe it to be equally probable that on the evening of October 13, 1881, the deceased would have missed his road and the accident have occurred that resulted in his death, if he had not drank intoxicating liquor on that day at all, then it will be your duty to return your verdict in favor of the defendants."

We have already seen that the proposition couched in the first of the above instructions, numbered three, is not the law. The liability of the individual defendants does not depend upon his having furnished deceased sufficient liquor on that day to intoxicate him, or while he was under the influence of liquor, but was complete if he furnished him liquor that contributed to his intoxication, provided

he was intoxicated and lost his life in consequence of such intoxication.

As to the second above instruction, numbered four, it is faulty in that it makes it necessary, in order to the liability of the defendants, that deceased should have been *proved* to have been intoxicated at the very moment of the accident. This is not the law. If he was intoxicated when he lost his way, and lost it in consequence of such intoxication, but afterwards became sober, and in an effort to regain the road drove over the bank to his death, the fatal result was nevertheless caused by his intoxication.

My objection to the last of the above instructions, numbered six, is, that it asks the jury to leave the well-beaten track of fact and proof and wander away into the field of probability. And again, it invites a comparison between a supposed probability and a matter of known fact—a region of investigation which no jury need enter.

The following instruction was also asked by plaintiffs in error:

“1. The plaintiffs are not entitled to a verdict for damages against the defendants, or either of them, unless it is established by a preponderance of the evidence, 1, that John Bauer, deceased, was, on the thirteenth day of October, 1881, furnished with intoxicating liquor by the defendants or some one or more of them, or by their clerks acting for them; 2, that deceased was on that day intoxicated; 3, that deceased continued to be intoxicated up to the time of missing his road and driving down to the creek where his death occurred; 4, that his being intoxicated was the cause of his death.”

The above was given, but there was also attached thereto the following: “And unless you find each and all of these four propositions to be established by a preponderance of the evidence, it will be your duty to return your verdict in favor of the defendants;” which latter portion was by the court detached and refused to be given to the jury.

Weaver v. Coumbe.

I think that the plaintiffs in error had all to which they were entitled out of these instructions. They had their four propositions of law given in the exact language in which they were presented. The words refused were simply a reiteration or emphasizing of that already given. It added nothing to it as matter of law; and, had it been given, it might have been regarded by the jury as a sort of endorsement from the court of the relative importance of what was contained in the propositions which went before. That it should not have this effect, was doubtless the reason why the court refused to give it. In this, I think the court committed no error.

As nothing is said in the brief of plaintiffs in error upon the point of excessive damages, I suppose that point to be waived.

Upon the whole I think that the case was fairly presented to the jury, and that their finding is fully sustained by the evidence and the law of the case. The judgment of the district court is affirmed. By the court,

JUDGMENT AFFIRMED.

AMOS WEAVER, PLAINTIFF IN ERROR, V. EDWARD
COUMBE, DEFENDANT IN ERROR.

15	167
38	319
15	167
41	612
15	167
53	408

Landlord and Tenant: LEASE. A lease of real property, duly signed by the parties but not witnessed or acknowledged, is valid between the parties and against subsequent lessees having actual notice of its existence.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

J. C. Crooker, for plaintiff in error.

The lease in question was simply a parol lease, good for a year, and determinable at the pleasure of either party at the end of the year. The owner of the fee, Mrs. Smith, served on Coumbe, January 15, 1883, a notice to quit at the expiration of the first year, viz., Feb. 15, 1883. Under the English rule, tenancies from year to year are supported only by the exception to the statute, and by the statute of Nebraska there can be no tenancy from year to year unless by a lease in writing. 4 Kent, pp. 112 and 125. *Harri-son v. Marshall*, 4 Bibbs, Ky., 525. This case is a parol demise for a year certain. In England, in this state and many others where the law is the same, such leasing would be valid. But if the tenant held over after the year he would then be a tenant from year to year. If there be a lease for a year, and by the consent of both parties, either express or implied, and the tenant continues in possession afterwards, the law implies a tacit renovation of the contract. *Park v. Castle*, 19 Howard's Prac., 29. *Ellis v. Page*, 1 Pick., 46. *Rowan v. Lytle*, 11 Wendell, 620. *Post v. Post*, 14 Barb., 253. See generally, Tyler on Ad-verse Enjoyment, pp. 206-7. 12 Halstead, N. J., 99. 2 Foster, N. H., 10. 1 Greenleaf's Ev., § 263. *Burns v. Bryant*, 31 N. Y., 453. *Barlow v. Wainwright*, 22 Vt., 92. Taylor's L. and T., § 466, 3d edition. Wood's L. and T., 339, § 255, also p. 82, § 40. *Messinger v. Arm-strong*, 1 D. & E., 54, also 1 D. & E., 162. Sedgwick on Trial of Title to Land, § 379. 70 N. Y., 180.

J. E. Philpott, for defendant in error.

A lease takes effect from date of its delivery. Wood L. & T., p. 375. Coumbe's lease was not delivered until March 1st, 1882. This action was commenced before Coumbe had enjoyed possession one year, for which he had paid. This lease was dated Feb. 28, 1882, this action was commenced before one year from that date. If the lease

commences to run from Feb. 15th, 1882, then the plaintiff permitted Coumbe to commence on his second year, for he did not serve notice on Coumbe to quit until Feb. 17th, 1883. Mrs. Smith, on January 15th, 1883, could not serve notice on Coumbe to quit, for on Dec. 18th, 1882, she parted with her reversion in and to the lands by her lease to plaintiff. See also the following cases: *Kittle v. St. John*, 10 Neb., 610. *Friedhoff v. Smith*, 5 Neb., 5. *Doe v. Stratton*, 4 Bing., 446. *Deveruch v. Moffet*, 15 Q. B., 257. *Thomas v. Parker*, 1 H. & N., 669. *Norton v. Thacher*, 8 Neb., 191.

MAXWELL, J.

In February, 1882, one, Henry C. Smith, by a lease in writing, leased to the defendant a farm of 160 acres for the term of five years, at a yearly rental of \$250, to be paid on or before the thirty-first of December of each year. The farm belonged to the wife of Smith, and she wrote on the lease: "I hereby agree to and ratify the foregoing lease. Mrs. H. C. Smith." The first year's rent was paid to and received by Mrs. Smith, and by her endorsed on the lease. The lease is in proper form, except that there is neither an acknowledgment nor a subscribing witness to it. On the fifteenth of December, 1882, Mary J. Smith, which the proof shows is Mrs. H. C. Smith, leased the farm in question, by a written lease, to Amos Weaver for the term of three years. Weaver, on the seventeenth of February, 1883, served the statutory notice upon Coumbe to quit the leased premises, and upon his failure to do so instituted an action to oust him from such possession under the act for forcible entry and detention. On the trial of the cause the justice found in favor of Coumbe and dismissed the action. The case was taken on error to the district court, where the judgment of the justice was affirmed.

The error assigned in this court is that the district court erred in affirming the judgment of the justice.

The claim of the plaintiff in error is, that the "written agreement between Mrs. Smith and Coumbe is within the statute of frauds and void for a term longer than one year not having been witnessed and properly executed or acknowledged by Mrs. Smith, or recorded."

Sec. 5, chap. 32 of the Comp. Statutes, provides that: "Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, be in writing, and signed by the party by whom the lease or sale is to be made."

Sec. 1, chap. 73, provides that "deeds of real estate or of any interest therein in this state, except leases for one year or for a less time, must be signed by the grantor, being of lawful age, in the presence of at least one competent witness, who shall subscribe his name as a witness thereto, and be acknowledged or proved and recorded as directed in this chapter."

No objection is made to the form in which Mrs. Smith signed the lease made to Coumbe; nor could such objection be invoked successfully, as her agreement and ratification are equivalent to a formal signing of the lease.

The question for determination therefore is, is the lease to Coumbe void because it is not acknowledged and witnessed?

The testimony shows that Coumbe took possession under his lease about the first of March, 1882, and was in possession of the premises at the time Weaver obtained his lease, and such possession was notice to all the world, not only of the possession itself, but of the right, title, and interest, whatever they may be, of the party in possession. *Uhl v. May*, 5 Neb., 157. *Parks v. Jackson*, 11 Wend., 464. In addition to this constructive notice, Weaver had actual notice of the lease to Coumbe at the time that he obtained his. He therefore acquired by his lease no greater right to the possession of the premises than was pos-

essed by Mrs. Smith at the time she executed the same. To entitle a lease to be recorded it must be duly signed, witnessed, and acknowledged. But a deed or lease if not recorded will still be good between the parties to the instrument, and will only be void as to subsequent *bona fide* purchasers or mortgagees, whose deeds shall be first recorded. 4 Kent Com., 456. 3 Washburn R. P., 282. *Kittle v. St. John*, 10 Neb., 605. *Lake v. Gray*, 30 Iowa, 415. *Id.*, 35 Iowa, 459.

Suppose that instead of a lease, Mrs. Smith had entered into an agreement in writing with Coumbe to sell him the farm for a specified sum in yearly payments, and the agreement was not witnessed, acknowledged, or recorded, could she allege its invalidity, and while the adverse party was not in default, proceed to sell the premises to another, who, upon receiving his contract, could oust the first purchaser from the possession of the premises? It will not be contended that the second purchaser would possess such power. Neither will a second lessee, who took his lease with knowledge of the first, and the lessee's rights thereunder. The lease to Coumbe was in proper form in all respects except the failure to witness and acknowledge the same. It is the deliberate contract of the parties and fully satisfies the statute of frauds as to being in writing, and did not terminate at the expiration of one year from its date. Weaver therefore acquired no rights in the premises as against Coumbe by virtue of the second lease. The judgment is right and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

15	172
30	480
33	810
33	811
15	172
43	696
15	172
47	800
15	172
59	740

DAVIS FOUTS, APPELLANT, v. HENRY P. MANN, AP-
PELLEE.

- 1. Mortgage Foreclosure: DEFENSE: COUNTER-CLAIM.** One M. purchased certain real estate for \$700, paying \$200 thereon, and giving five notes for \$100 each with interest, and payable in one, two, three, four, and five years, and secured by mortgage on the real estate. The first note was paid, and a portion of the interest on all. Default being made in the payment of the second note, an action was instituted to foreclose the mortgage, and the maker having removed from the state, service was had by publication, and a decree rendered and sale of the mortgaged premises, which were purchased by the mortgagee, who then commenced an action on the fourth and fifth notes. M. answered, setting up the invalidity of the proceedings to foreclose the mortgage, and a prayer to redeem from the same. *Held*, That the matter stated in the answer constituted a counter-claim.
- 2. Service by Publication.** An affidavit for service by publication is sufficient if it states the nature of the cause of action for which publication may be made, and that service of summons cannot be made upon the defendant or defendants within the state.
- 3. ———: AFFIDAVIT: OMISSION.** If land of the description given is within a county where an action is commenced to foreclose a mortgage thereon, the omission of the name of the county or principal meridian in the affidavit and notice, is not fatal.
- 4. ———: PUBLICATION IN NEWSPAPER.** Four weekly publications of a notice to foreclose a mortgage are sufficient; and five weekly publications are equally valid.
- 5. Records: SIGNATURE OF JUDGE.** The failure of the judge to sign a decree of foreclosure, or the record, does not affect the validity of a judgment actually rendered.

APPEAL from the district court of Gage county. Heard below before WEAVER, J.

Colby & Hazlett, for appellant.

The second defense in the answer is not a counter-claim.

Walker v. Millard, 29 N. Y., 375. *Thorpe v. White*, 13 Johns., 56. 1 Parsons Notes and Bills, 197. *Loomis v. Eagle Bank*, 10 Ohio State, 327. *Edgerton v. Page*, 20. N. Y., 281. *Duffy v. Duncan*, 35 Id., 187. On signature of judge to decree, cited: *Nuckolls v. Irwin*, 2 Neb., 66. *Clough v. State*, 7 Id., 321. *Wise v. Frey*, 9 Id., 220. *Gillette v. Morrison*, Id., 400. Defect in description in order of sale does not invalidate proceedings. Decree itself is authority for the action of the sheriff, not the order of sale. *Rector v. Rotton*, 3 Neb., 177. See also *Douglass v. McCoy*, 5 Ohio, 522. *Longworth v. Bank*, 6 Id., 536. *Armstrong v. McCoy*, 8 Id., 128. *Spiller v. Nye*, 16 Ohio, 16. The confirmation of the sale cured irregularities. Rorer on Judicial Sales, 108. *Phillips v. Dawley*, 1 Neb., 320. *Crowell v. Johnson*, 2 Id., 146. *Day v. Thompson* 11 Id., 125.

L. M. Pemberton, for appellee.

On subject of counter-claim, cited: *Pomeroy Rem.*, § 738. *Bliss Code Pl.*, §§ 125, 372 and cases cited note 1, page 447. *Smith v. Fife*, 2 Neb., 10. *Gordon v. Benuer*, 49 Mo., 570. *Allen v. Shackleton*, 15 Ohio St., 145. *Isham v. Davidson*, 52 N. Y., 237. *Norris v. Tharp*, 65 Ind., 47. On defects of affidavit for publication, cited: *Atkins v. Atkins*, 9 Neb., 191. *McGavock v. Pollock*, 13 Neb., 535. *Shields v. Miller*, 9 Kan., 390. *Forbes v. Hyde*, 31 Cal., 342. *Claypoole v. Houston*, 12 Kan., 324. On insufficient description of property, cited: *Coben v. Troubridge*, 6 Kan., 385. 1 Jones on Mortgages, § 66 and cases cited. On notice of publication, cited: *Crowell v. Galloway*, 3 Neb., 215. *Fanning v. Krapf*, 14 N. W. R., 728. Even if no order of sale was necessary, sheriff could not sell until he had given the notice required by law. Rorer, § 99. *Wade on Notice*, § 1088. *Collins v. Smith*, 15 N. W. R., 192. *Wescott v. Archer*, 12 Neb., 345. *Wheatley v. Terry*, 6 Kan., 427.

MAXWELL, J.

In October, 1875, the defendant executed and delivered to the plaintiff five promissory notes each for the sum of one hundred dollars with interest, and payable in one, two, three, four, and five years. To secure the payment of these notes, the defendant and wife executed a mortgage upon the following described real estate, to-wit: Commencing at the north-west corner of the south-west quarter of the the south-east quarter of section seventeen, in town two north, of range seven east; thence running east seventeen rods, 22 1-5 links; thence south seventeen rods, 22 1-5 links; thence west seventeen rods, 22 1-5 links; thence north seventeen rods, 22 1-5 links to place of beginning, containing about two acres. The land is situated in or near the town of Blue Springs, and at the time the mortgage was given and now contains a dwelling-house and was worth from \$500 to \$800. The first note was paid in full and a considerable sum on one of the others with a portion of the interest. In February, 1878, the plaintiff commenced an action in the district court of Gage county to foreclose the mortgage, alleging that there was due thereon the sum of \$142.90 with interest from January 4th, 1878. The defendants having removed from the state, an affidavit for constructive service upon them was filed and service had by publication. Notice by publication was duly made and a decree of foreclosure in proper form was duly rendered. Objections to the affidavit for publication and the notice will be considered hereafter. An order of sale was issued in which the premises were described as follows: "Commencing at the north-west corner of the south-west quarter of the south-east quarter of section seventeen, in town two north, of range seven east; thence running east seventeen rods, 22 1-5 links; thence south seventeen rods, 22 1-5 links; thence *north* seventeen rods, 22 1-5 links to the place of beginning." This mistake

is found in the notice of sale, appraisalment, return of the officer, and all the proceedings, including the first deed from the officer to Fouts. The plaintiff then took possession of the mortgaged premises, and has retained the possession ever since. In February, 1882, the plaintiff commenced an action by attachment against the defendant, Henry P. Mann, in the district court of Gage county, and caused certain property of Mann to be attached, upon the ground that he was a non-resident of the state.

To this action the defendant filed an answer, wherein, *first*, he alleges payment of one of said notes; *second*, that the defendant, in 1875, purchased the premises in question from the plaintiff for the sum of \$700, \$200 of which was paid in cash, and five notes for one hundred dollars each secured by mortgage on the premises were given for the balance, and that the notes sued on are a portion of said notes; that defendant paid the first of said notes and the interest on the remainder, and in addition \$100 to apply on said indebtedness. The defendant then sets out the proceedings for the foreclosure of the mortgage, and the sale of the premises to the plaintiff thereunder, and claims that such proceedings are void, and asks that an account may be taken and the defendant be permitted to pay the amount due upon said mortgage. The plaintiff alleges that the second count of the answer does not constitute a counter-claim because it does not arise out of the contract or transaction set forth in the petition.

Sec. 101 of the code provides that the counter-claim must be one arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim or connected with the subject of the action.

There is no doubt the defense set up in the second count of the answer arises out of the transaction set forth in the petition as the cause of action, and is a valid counter-claim. *Smith v. Fife*, 2 Neb., 10. *Allen v. Shackleton*, 15 Ohio State, 145. *Goebel v. Hough*, 26 Minn., 252. *Orton v.*

Noonan, 30 Wis., 611. *McArthur v. Canal Co.*, 34 Id., 139. *Ainsworth v. Bowen*, 9 Id., 348. *Norris v. Thorpe*, 65 Ind., 57.

2. Objection is made to the affidavit for service by publication. It is as follows, omitting the title:

"State of Nebraska, }
Gage County. }

"Alfred Hazlett, being first duly sworn, upon his oath says that he is one of the attorneys for plaintiff in the above entitled action, duly authorized in the premises; that on the sixth day of February, 1878, said plaintiff in the above case filed his petition in the said court against said defendants to recover the sum of \$142.90, with interest at 10 per cent from fourth of July, A.D. 1878, amount due on promissory note and interest as set forth in said plaintiff's petition, and asking that the mortgage described in plaintiff's petition be foreclosed, the said premises ordered sold, and the proceeds applied to the payment of said debt; said mortgage given on a certain plat or parcel of land containing two acres, more or less, described as follows: Commencing at the north-west corner of south-west quarter section 17, town 2 n., range 7 east, thence running east 17 rods, 22 1-5 links; thence south 17 rods, 22 1-5 links; thence west 17 rods, 22 1-5 links; thence north 17 rods, 22 1-5 links to place of beginning. The object of above action is to foreclose the above mortgage on above described real estate.

"The defendants, Henry P. Mann and Maria T. Mann, are non-residents of the state of Nebraska, and service of summons cannot be made upon them within the state of Nebraska, and plaintiff asks that service of publication may be had in above entitled cause, and for this purpose this affidavit is made by affiant.

"ALFRED HAZLETT.

"Sworn to and subscribed in my presence this seventh day of Feb'y, A.D. 1878.

"[L. S.]

"CHAS. O. BATES,
Notary Public."

Sec. 51 of the code provides that actions for the sale of real property under a mortgage lien or other incumbrance or charge shall be brought in the county in which the subject of the action is situated, except as provided in section 52, which refers to an entire tract situated in two or more counties, or separate tracts situated in two or more counties.

Sec. 77 provides for service by publication in actions brought under the provisions of sections 51 and 52, etc.

Sec. 78 provides that, "before service can be made by publication an affidavit must be filed that service of a summons cannot be made within this state on the defendant or defendants to be served by publication, and that the case is one of those mentioned in the preceding section. When such affidavit is filed the party may proceed to make service by publication."

It will be seen that two essential facts are to be stated in the affidavit. *First*, That service of a summons cannot be made within the state on the defendant or defendants to be served by publication. *Second*, The character of the action, so that it may appear that it is one in which service by publication may be made. If the affidavit shows that the action is one in which service by publication may be made, and that service cannot be had upon the defendant within the state, it is sufficient.

In *Atkins v. Atkins*, 9 Neb., 191, the action was for divorce, and it was stated in the affidavit "that this cause is one mentioned in section No. 77 of title V. of the Revised Statutes as amended." The section referred to relates wholly to property, and the affidavit was held insufficient to authorize publication in an action for *divorce*.

In *Shields v. Miller*, 9 Kas., 390, it was not stated in the

affidavit that service of summons could not be made on the defendants within the state of Kansas.

In *Slocum v. Slocum*, 17 Wis., 150, it was held that the facts stated in the affidavit did not authorize service by publication.

In *Forbes v. Hyde*, 31 Cal., 342, the affidavit was filed about four months before the order for service by publication was made, and it was held insufficient because it did not appear that personal service could not be made on the defendant when the order for publication was made. But the affidavit in this case is not open to any of these objections.

Considerable stress is laid upon the use of the word "them," in the affidavit referring to Mann and wife. The word "them," following as it does the names of the defendants, Henry P. Mann and Maria T. Mann, cannot be mistaken, and is equivalent to saying that service could not be made on Mann and wife within the state.

But it is said that the affidavit is defective because it does not appear that the land is situated in Gage county, as neither the principal meridian nor county is stated. Land of the description here given is within Gage county, and where such is the case, the presumption is, such is the land referred to. This question was before this court in *Butler v. Davis*, 5 Neb., 521, where neither the county, nor state were designated, the deed being made in the state; and it was held that it would be presumed that the description referred to lands in this state. *Harding v. Strong*, 42 Ill., 149. This objection, therefore, is untenable.

It is claimed that the notice is invalid because it was published five consecutive weeks instead of four as required by the statute, but this extended publication was favorable to the defendants as it increased the probabilities of their acquiring actual notice of the pendency of the action. It was good service for four weeks, although the fifth publication was unnecessary. The objection therefore is not well taken.

The next objection is that the decree of foreclosure was never signed or approved by the judge. That the decree was actually rendered is not questioned, and where such is the case, the failure of the judge to sign the decree or record does not render it illegal or void.

A more serious question arises as to the description of the premises in the order of sale, appraisement, return of the officer, and the first deed made to the purchaser, the description being, and all that was offered for sale and sold, was as follows: Commencing at the north-west corner of the south-west quarter of the south-east quarter of section 17, in town 2 north, of range 7 east; thence running east 17 rods and 22 1-5 links; thence south 17 rods, 22 1-5 links; thence *north* 17 rods, 22 1-5 links to place of beginning. To what extent such a description could be sustained in favor of a *bona fide* purchaser it is unnecessary to enquire, this being an action between the original parties. The land was sold for about one-half of the original purchase price, and after about one-half of the purchase money had been paid. Surely in offering the premises for sale, they should have been described so that a third party purchasing would have been assured that he was obtaining the mortgaged premises. Of this he had no assurance under the order of sale and notice. This doubtless prevented all competition, and permitted the plaintiff to purchase at his own price. The failure to describe the premises doubtless was a mistake, but the effect of it was to prevent a fair sale, and thereby to that extent deprive the defendants of the property and to benefit the plaintiff.

This being so, we think the defendants have shown sufficient facts to entitle them to redeem the premises. And as that was the decree of the court below, it is affirmed.

DECREE AFFIRMED.

THE other judges concur.

**JAMES G. BREWER, PLAINTIFF IN ERROR, v. THE BOARD
OF CO. COMMISSIONERS OF MERRICK COUNTY, DE-
FENDANT IN ERROR.**

1. **Mortgage to secure payment of county bonds.** Where a party has executed a mortgage of real property to secure the repayment to the county of the amount of certain coupon bonds, voted by the electors of the county, and issued by the county commissioners, and delivered to such person to aid him in building a water grist mill, an action will not lie in equity to remove said mortgage, as a cloud on the title of the plaintiff to such real property, without first paying off such mortgage, according to the terms thereof, or returning to said county the value of such coupon bonds.
2. **A petition in an action in the nature of an action *quia timet* to remove a cloud from the title of land, which fails to contain an allegation that the plaintiff owns, or claims such land, or has title thereto, is demurrable.**

ERROR to the district court for Merrick county. Heard below before POST, J.

Webster & Sparks, for plaintiff in error, cited *Thompson v. Lee County*, 3 Wall., 330. *Ind., N. & S. R. R. Co. v. City of Attica*, 56 Ind., 476. *Middleport v. Aetna Life Ins. Co.*, 82 Ill., 562. *Hamlin v. Meadville*, 6 Neb., 227. *Stewart v. Otoe County*, 2 Neb., 177.

A. Ewing, for defendant in error.

COBB, J.

This action was brought in the district court for Merrick county, for the purpose of setting aside, having declared null and void, and removing as a cloud upon the title of plaintiff's lands, a certain mortgage executed by plaintiff and wife to the treasurer of Merrick county, upon certain lands of the plaintiff, situated in said county. The pur-

pose and object of the said mortgage will be gathered from the defeasance clause thereof, which I copy as follows, to-wit: "*Provided, however,* and this conveyance is made to, and the title to said property is to be held by, the said treasurer of Merrick county, his successors or assigns, in trust and upon the conditions and for the purposes hereinafter stated, to-wit: Whereas, in pursuance of a majority vote of the electors of said Merrick county, at a special election held for that purpose in said county, on the 9th day of January, A.D. 1872, the county commissioners of said Merrick county did, on the 1st day of February A.D. 1872, execute and issue certain bonds of said Merrick county, known and designated as the Merrick County Mill Bonds, dated the 1st day of February, A.D. 1872, each for the sum of one hundred dollars, payable at the office of the county treasurer in and for said Merrick county, amounting in all to the sum of six thousand dollars, bearing interest at the rate of ten per cent per annum, payable semi-annually on the first days of August and February in each year, at the National Park Bank in the city of New York; which said bonds were authorized and issued, and are to be loaned to the said James G. Brewer for the purpose of aiding said James G. Brewer in building a public grist mill and water power in said Merrick county, on section thirty-one in township thirteen north, range six west. Two thousand dollars of said bonds to be delivered to said Brewer, at the date and on the execution and delivery of this instrument; two thousand dollars of said bonds to be delivered to said Brewer at the expiration of three months from the date hereof, in case said work shall have progressed satisfactorily to the county commissioners of said Merrick county; and the balance of two thousand dollars of said bonds to be delivered to said Brewer, at the expiration of six months from the date hereof, or when said mill and water power shall have been completed to the satisfaction of said county commissioners; said county of Merrick to

provide and pay all semi-annual installments of interest on said bonds. Now therefore, if the said James G. Brewer, his heirs or assigns, shall pay or cause to be paid to the treasurer of said Merrick county, his successors or assigns, to and for the use of said county, on or before the first day of February, A.D. 1882, the full amount of all of said bonds, which shall have been received by said Brewer, his heirs or assigns, and a written receipt therefor, endorsed on this instrument, together with interest thereon, at the rate of ten per cent per annum from date, until paid, then and in such case this instrument to become null and void; otherwise, to be and remain in full force and effect."

The plaintiff in his petition alleged that "the sole and only consideration for which the said mortgage deed was executed and delivered, was for the coupon bonds of said Merrick county to the amount of six thousand dollars (as described in said mortgage copied above). That said bonds were voted and issued to aid in a work of internal improvement in said Merrick county, to-wit: A water flouring grist mill and water power on the Platte river, near the then village of Lone Tree, now Central City. That the plaintiff expended the whole amount of the money realized from the sale of said bonds, by the direction and under the supervision of the said board of county commissioners of said Merrick county, in and about said work of internal improvement. Then follows a description of the mortgaged premises and prayer for judgment.

A general demurrer to the plaintiff's petition was sustained, and a judgment of dismissal and for costs, rendered for the defendant. The plaintiff brings the cause to this court on error.

Whatever may be the law as to the power of the county commissioners to accept an indemnity to the county from the recipient of bonds, voted to aid a work of internal improvement, or whether such indemnity being in the form of a mortgage on real estate, such mortgage could be fore-

closed and such real estate sold, it is unnecessary—nay, improper—to consider in this case. The question is, has the plaintiff suffered any loss which ought to be restored to him, or is any wrong threatened his estate which equity ought to step in and prevent? Nothing of the kind is disclosed by the petition. Whether the county commissioners had the power to accept plaintiff's mortgage or not, he certainly had the power to make and deliver it, which he has done, and received the consideration for it. It is not alleged in the petition that in this transaction, there was either fraud, accident, or mistake. There certainly could be no fraud on the part of the county commissioners, or the people whom they represent of which the plaintiff can complain in giving him the six thousand dollars in coupon bonds, nor does he allege that he gave this mortgage to secure the return of the money in ten years, through accident or mistake; but on the contrary it appears that it was all done in strict conformity with an agreement between the plaintiff and the authorities and people of Merrick county. It may be possible that the plaintiff having received the consideration for that agreement and enjoyed it for ten years or more, can now repudiate it. I do not decide that question; but I do say that he cannot do it by means of a suit commenced by him in a court of equity. So far at least as equity is concerned he must comply with his part of the agreement, or restore the consideration which he received for this mortgage, before he can successfully set the machinery of the courts in motion for its cancellation.

As a mere matter of pleading the plaintiff's petition is insufficient; he nowhere alleges himself to be the owner of the lands from the title of which he seeks to remove the cloud of the mortgage, nor does he state directly that he possesses or claims any title to them whatever. While we have heretofore held that it was not necessary to the maintenance of this action that the plaintiff should allege or prove a fee simple title in the premises, yet of whatever

character his title is, he should plead it in issuable form. *McDonald v. Early*, ante p. 63.

The demurrer was therefore properly sustained and the judgment of the district court is affirmed. By the court,

JUDGMENT AFFIRMED.

15 184
56 507

AUGUSTA P. CONLEE, APPELLEE, v. JOS. B. McDOWELL
AND OTHERS, APPELLANTS.

Purchaser of Real Property: NOTICE TO. It is a general rule, to which, however, there are some exceptions, that the open, notorious, and exclusive possession of real property by a tenant is notice to the world of the landlord's title. Rule applied.

APPEAL from the district court of Gage county. Heard below before WEAVER, J., the facts being as follows:

Prior to February 1, 1879, the plaintiff owned and was in possession of lot 11, block 3, Beatrice. She had mortgaged the premises, a foreclosure had been had, and, pursuant to an agreement between her and Smith and Dunbar the latter bid off the premises, Smith furnishing the money. A few days afterwards Dunbar conveyed to McDowell by quit-claim, McDowell giving his note to Smith for the amount Dunbar had bid for the premises, \$336, and giving to Mrs. Conlee a bond for a deed. McDowell conveyed to Smith, and Smith conveyed to Holmes. The plaintiff brought this action alleging in substance that McDowell obtained the title in trust for plaintiff, that his conveyance to Smith and Smith's to Holmes were in fraud of her rights, that she had tendered the said sum of \$336 and interest to Smith and demanded a deed, and praying that the said conveyance be set aside and McDowell be required to con-

Conlee v. McDowell.

vey to her. Decree below for plaintiff. Defendant appeals.

Colby & Hazlett, for appellants.

The bond was never filed and recorded, and Holmes' rights could not be affected. *Lanphere v. Lowe*, 3 Neb., 139. *Sheldon v. Conner*, 48 Me., 584. On Holmes' purchase, cited: *Eyre v. Dolphin*, 2 B. & B., 301. *Wickham v. Conkton*, 8 Johns., 220. *Jackson v. Sharp*, 9 Id., 163. On possession by tenant, cited: *Burt v. Baldwin*, 8 Neb., 487. *Attorney General v. Blackhouse*, 17 Ves., 293. *McMechan v. Griffing*, 3 Pick., 149. Wade on Notice, 281. *Barnhart v. Greenchilds*, 28 Eng. L. and E., 77.

A. Hardy, for appellee.

Holmes was charged with notice. *Uhl v. May*, 5 Neb., 157. *Parks v. Jackson*, 11 Wend., 464. Wade, §§ 273, 284, 285. *Williams v. Springg*, 6 Ohio State, 594. *Harper v. Perry*, 28 Iowa, 57. *Hunter v. Watson*, 12 Cal., 363. *McKenzie v. Perrill*, 15 Ohio State, 162. *Hood v. Fahnestock*, 1 Penn. St., 470. *Wicks v. Lake*, 25 Wis., 71. *Fronz v. Orton*, 75 Ill., 100.

LAKE, CH. J.

The consideration of a single question discussed by counsel will dispose of this case. That question is, whether in view of the evidence the court below was justified in finding that the defendant Holmes purchased the lot in question with notice, either actual or constructive, of the plaintiff's interest therein.

It seems that for a considerable time prior to the twenty-sixth of January, 1881, the defendant McDowell, under an arrangement with the plaintiff, held the legal title to the lot in trust for and to be conveyed to her upon the payment

by her of his note for three hundred and thirty-six dollars, at twelve per cent interest, to Smith Brothers, bankers, at Beatrice, of which the defendant Smith was one. On this note, which was given February 10th, 1879, the plaintiff had paid the interest in full to the fifteenth of June, 1880.

On the twenty-sixth of January, 1881, McDowell, without notice to the plaintiff, formally conveyed the lot by quit-claim deed to the defendant Smith, who took it with full knowledge of her interest therein. In his testimony, McDowell says of his arrangement with Smith Brothers respecting the making of this deed: "I had a conversation with Samuel Smith a short time before the deed was made, in which he insisted on the payment of my note. I told him I had not any money I wanted to use in that way. He insisted on payment, or a deed to the premises. I then told him that I had promised Mrs. Conlee a deed if she would pay in a reasonable time. I asked him if he would carry out my contract, or words to that effect; he answered that he would. I made the deed in a short time and sent it to the bank and they sent me my note." Not only this, but Smith himself admits that when he took the deed he "had understood in some manner that there was a bond in existence by which McDowell was to deed the property to Mrs. Conlee on the payment of a certain note." On giving this testimony he was asked, "What note was that?" and answered, "This three hundred and thirty odd dollars." He admits also that the several payments of interest on this note were made, not by McDowell, but by either the plaintiff or her husband. Indeed there is no doubt whatever that, in taking this conveyance, Smith simply stepped into McDowell's shoes and took the lot subject to the plaintiff's right to have the title conveyed to her upon paying the stipulated price.

It appears that the first information the plaintiff had of this conveyance to Smith was in May, 1881, on going to Smith Brothers' bank to pay some interest on, and to see

about paying off, the McDowell note, when Smith told her that he "held the deed to the property himself," and would convey it to her only on condition of her paying the amount still due thereon, and also something over five hundred dollars more which her husband owed him. This, she says, she refused to do, but told him she would pay what she herself owed, which "he said he would not take." And Smith himself says of this interview at which Mrs. Conlee offered to pay what she still owed on the lot under her contract with McDowell: "I told her that Conlee (her husband) was owing us some money besides, and I would not make the deed unless the whole matter was settled." This exaction was of course unwarranted, and Mrs. Conlee was right in rejecting it.

On the twenty-first of July following, Smith, on his own suggestion, as it seems, and without any apparent reason, except perhaps to embarrass Mrs. Conlee, and force her to accede to his unjust demand to save her property, formally sold and conveyed the lot to Holmes, who was then, in certain real estate transactions, his partner. Under this state of facts we do not hesitate to say that, as against Mrs. Conlee, Smith was guilty of a palpable fraud, which, if permitted to succeed, would result in robbing her of property worth, as the evidence shows, some twelve or thirteen hundred dollars, and on which he had the right to demand from her less than four hundred dollars. It is the delight of the law to thwart such schemes whenever it is possible to do so.

But how is it with the defendant Holmes? Under the evidence can it reasonably be said that he was not a party to the fraud? He has not deigned to give us his version of the affair by appearing as a witness in the case. But the circumstances of his purchase as given by Smith, on whom he seems to rely, are not at all favorable to his claim of being an innocent purchaser. According to the testimony of Smith, whose object as we have seen clearly was to defraud Mrs. Conlee, he met Holmes on the street and said

to him that he had a piece of property he wanted to sell him for a thousand dollars. That thereupon Holmes, without any knowledge of the property, and without going to see it, or making any inquiry concerning it, at once accepted the offer and purchased it. If, indeed, Holmes were not fully aware of Smith's purpose in selling the lot, of which there is at least a strong suspicion, intensified by his silence, the most favorable light in which he can be viewed shows him to have been an exceedingly pliant and available although innocent tool in the perpetration of the fraud.

But whether Holmes had actual notice of Mrs. Conlee's interest in the lot, or not, is quite unimportant. That he at least had constructive notice is satisfactorily proved, and that is enough to defeat him. Under her arrangement with McDowell, and at the time of his transfer of the title to Smith, Mrs. Conlee was in the exclusive possession of the property, as the home of herself and family. Neither McDowell nor Smith ever had possession. At the time Smith sold to Holmes, Mrs. Conlee, although then living in Lincoln, was still in possession of the property by her tenant, George Hartley, who, as his testimony, which is not disputed, satisfactorily shows, was living on the premises on the 21st of July, 1881. It is insisted by counsel that the evidence on this point is not sufficiently definite. It is true that to a question as to when he moved into the house he answered rather indefinitely: "About the 20th of July, 1881." But afterwards to the inquiry, "How long did you keep the house?" he said, "from July 20th to the 25th of August." On this showing we are of opinion that the court below was warranted in finding the premises in the occupancy of Hartley on the 21st of July, the day on which Holmes made his purchase. That Hartley entered as tenant of Mrs. Conlee is unquestioned. Therefore, if this possession by the tenant of Mrs. Conlee may properly be said to have been constructive notice of her

interest in the property, Holmes is clearly chargeable with it.

But it is claimed the possession of a tenant is not notice of his landlord's title, but simply of his own interest in the property; and cases are cited which in a measure support that view. It was at one time so held in California. *Smith v. Dall*, 13 Cal., 510. But that decision was afterwards overruled, and the doctrine there established that "open, notorious, and exclusive possession of real estate by a tenant, is sufficient to put a purchaser upon inquiry as to the landlord's title." *Dutton v. Warschauer*, 21 Cal., 609. See also *Hanly v. Morse*, 32 Me., 287. *Pitman v. Gaty et al.*, 10 Ill., 186. *Landers v. Bolton*, 26 Cal., 419. And such we think is the general rule, to which, however, there are numerous exceptions, one at least of which was recognized, and influenced our decision in *Burt v. Baldwin*, 8 Neb., 487, to which we are referred as supporting the rule urged on behalf of Holmes. The exception to the general rule recognized in that case is, that the tenancy must commence after the lessor acquires his title. And this is the application there made of it. "Mr. Johnson once owned this land himself. He occupied it then as he continued to do after he sold it to Horr, after Horr sold it to Gallagher, and after Gallagher executed this unregistered deed to Baldwin. His continued occupancy could scarcely be evidence of those changes in the title, some of which it is apparent he had no accurate knowledge of himself."

Here, however, we encounter no such difficulty. The plaintiff acquired her right long before she leased to Hartley, and, as we have seen, had for several months at least been in the actual occupancy of the property herself. Indeed, so far as appears, only she and her tenants had been in possession of it at any time. We are of opinion, therefore, that Holmes is chargeable with notice of the plaintiff's right to the lot, and that she is entitled to the relief which the court below gave.

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It is claimed on the part of the plaintiff, that the amount found by the court to be due on the lot, and which she is required by the decree to pay, is too large. This claim is based on the fact of a tender of payment, which it is said stopped the accruing of interest. This would have been so if the tender had been kept good. The allegation that it was kept good is denied, and there is no evidence on the subject.

JUDGMENT AFFIRMED.

THE other judges concur.

15	190
16	664
18	449
18	681

15	190
34	271
34	571
36	820

15	190
41	199

15	190
50	213

15	190
60	212
60	470

JAMES G. TAYLOR, PLAINTIFF AND APPELLANT, V. D.
G. COURTNEY ET AL., APPELLEES, AND JOSEPH MAN-
NING APPELLANT.

1. **Taxes:** REPEAL OF SPECIAL LIMITATION AS TO TAX DEEDS. Section 105 of the revenue law of 1869, as amended in 1871, which declared that after a lapse of three years from the time of recording the treasurer's deed, the owner of lands should be debarred from commencing or maintaining an action to recover the same, was repealed without a saving clause by the revenue law of 1879. Hence, unless the party claiming title under the tax deed had been in possession three years before the act was repealed, his title is not aided by the statute. [COBB, J., dissenting.]
2. —: REDEMPTION. Where a tax purchaser received a large portion of the taxes paid from the owner of the land, for the redemption on the same, *Held*, That the owner was entitled to redeem. And a purchaser who took a quit-claim deed for the premises, with a statement in the deed of the trust, was chargeable with notice. [COBB, J., dissenting.]
3. **Execution.** An execution from which the seal of the court has been omitted is not void, but may be amended even after the sale is confirmed.

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4. **Bona fide Purchaser.** Where the holder in possession under a tax deed proclaimed at a sale of the premises upon an execution against the owner, that he had a deed from such owner for the same, and thereby prevented competition, and the purchaser knowing these facts purchased the property for very much less than its actual value, and then commenced an action to restrain the payment of the money, *Held*, That he was not a *bona fide* purchaser and that the owner was entitled to have the sale set aside.

APPEAL from the district court of Lancaster county.
Tried below before POUND, J.

Lamb, Billingsley & Lambertson, for appellant Taylor.

1. The limitation clause of the act of February 15th, 1869, as amended June 6th, 1871, § 105, General Statutes of Nebraska, is no bar to this action. This clause is unconstitutional. *Groubeck v. Seeley*, 13 Mich., 329. *Walby v. Callender*, 8 Mich., 430. *Quindon v. Rogers*, 12 Mich., 169. *Case v. Dean*, 16 Mich., 12. The above act of February 15th, 1869, was repealed by the revenue act of September 1st, 1879, before the right of action was barred, and before the defendant Courtney had acquired any right under said limitation act. The tax deed was recorded February 13th, 1878. At the date of the repeal, plaintiff's right of action was complete. There was no saving clause in said repealing act preserving to the defendant Courtney the time already run. The statute was simply obliterated, and the year and a half devoured by the old act, not being a vested right, goes for nought. Plaintiff's right of action at the date of repeal was just as complete as if no limitation act had been in existence. Upon the advent of the repealing statute, the action became re-juvenated, and took a new lease of life.

2. The defendant cannot avail himself of limitation clause of the revenue act that went into effect September 1st, 1879. Three years have not run since the statute

went into effect. You cannot add to the time run under the old act the time run under the new, and in this way patch up a three years' limitation, unless there is a saving clause in the new act authorizing such a method of computation. *Coffin v. Rich*, 45 Maine 507. *Battle v. Forbes*, 19 Pick., 578. *Scarborough v. Dugan*, 10 Cal., 308. *Johnson v. Meeker*, 1 Wis., 382. The uniform rule is that statutes of limitation apply to rights of action which are to commence *in future*. Angell on Limitation, § 23. There is nothing in the act of September 1st, 1879, that extends the provision of the law quoted above to deeds made anterior to the passage of said law. On execution title, cited: *Arnold v. Nye*, 23 Mich., 287. *Sabin v. Hustin*, 19 Wis., 421. *Rose et al. v. D. V. R. Co.*, 47 Iowa, 420. *People v. Dunning*, 1 Wend., 16. *Sawyer v. Baker*, 3 Greenleaf, 29. *Dominick v. Eacker*, 3 Barbour, 17.

Burr & Marshall, for appellant Manning, cited: *Ins. Co. v. Halleck*, 6 Wall. (U. S.), 558. *Swett v. Patrick*, 2 Fairfield (Me.), 179. *King v. Baker*, 7 La. Ann., 571. *Lee v. Newkirk*, 18 Ill., 550. *Hannem v. Thompson*, 1 Scam. (Ill.), 238. *Monaghan v. Monaghan*, 25 Ohio State, 328. *Toof v. Bentley*, 5 Wend. (N. Y.), 276. Freeman on Void Judicial Sales, p. 59, citing *Townsend v. Tallent*, 33 Cal., 54. *Griffith v. Judge*, 49 Mo., 536. *Chamblee v. Tarbox*, 27 Tex., 149. *Tirman v. Wilson*, 6 Johns. Ch., 410. *Hamilton v. Quimby*, 46 Ill., 90.

J. L. Caldwell and *D. G. Courtney*, for appellees, on possession and limitation, cited: *Eldridge v. Kuehl*, 27 Iowa, 161. *Douglas v. Tallock*, 34 Iowa, 262. *Oconto Co. v. Jerrard*, 46 Wis., 317. *Milledge v. Coleman*, 47 Wis., 184. *Suydam v. Williamson*, 24 Howard, 427. *Parrett v. Holmes*, 12 Central Law Journal, 200. The enactment of the revision was not the making of a new law, but merely a continuation of the old. *Thompson v. Reed*, 41 Iowa, 48. *McDonalds v. Jackson*, 55 Iowa, 38.

Hall's application for habeas corpus, 10 Neb., 537. On seal to execution, cited: *Insurance Co. v. Halleck*, 6 Wall., 588.

MAXWELL, J.

The plaintiff claims to be the owner of lot 18 in block 56 in the city of Lincoln, with the building thereon known as the "Clifton House," and filed his petition against Courtney and wife in the district court of Lancaster county to redeem said real estate from certain tax sales under which Courtney holds possession, and to recover the possession, and for the rents and profits. Courtney and wife answered the petition alleging that they and their grantor have been in possession of said premises ever since the 13th day of February, 1878, under a tax deed to Harris, Courtney's grantor, which deed was at the aforesaid date duly recorded, and which being recorded for more than three years vests a perfect title in the defendants, and also alleging that the plaintiff claims title under a sale upon execution against one Joseph Manning, the former owner of said premises, which sale was void for certain reasons specified, but principally because there was no seal upon the execution. Manning was permitted to intervene, and filed an answer and cross bill claiming to be the owner of the premises and setting up certain defenses which will be referred to hereafter, and asking for affirmative relief. On the trial of the cause in the court below, a decree was rendered in favor of Courtney. Manning and Taylor appealed to this court.

The title to the premises in question is in Manning unless it has been divested by the tax deed held by Courtney, or the sheriff's deed held by Taylor. These questions will be considered in their order.

It appears from the record that on the thirty-first day of December, 1875, one Charles L. Harris purchased the

premises in question at private tax sale for the taxes due thereon for the year 1874, being the sum of \$202.50. There is testimony tending to show that there was an agreement between Harris and Manning that the latter was to be permitted to redeem the premises by paying the amount of taxes and interest as fast as he was able, and the following receipt was given in evidence:

"\$79.20. Rec'd Lincoln, Neb., Sept. 22, 1876, of Joseph Manning, Esq., the sum of seventy-nine 20-100 dollars to apply on redemption of lot No. 18 in block No. 56, Lincoln, Neb., sold for taxes of 1874 on the thirty-first day of December, 1875.

"M. R. JOHNSON,

"By W. W. WILSON, *Agent.*"

Manning appears to have been unable to raise money to pay the remainder of the redemption money, and on the thirteenth of February, 1878, Harris obtained a tax deed from the treasurer of Lancaster county and entered into possession, and such possession continued until he conveyed to Courtney, on the twenty-third of December, 1879; Courtney then took possession under said deed, and has remained in possession receiving the rents and profits ever since. The deed from Harris to Courtney is a quit-claim, and contains this provision: "Provided said D. G. Courtney and his assigns, executors, and administrators shall and will save said Charles L. Harris harmless from any and all claim or claims by any person or persons whomsoever for rents received or for the use and occupation of said premises prior to the first day of January, 1880, and said rents and profits up to that date shall be applied on taxes paid, repairs done on said premises while the same was occupied by said Harris under tax and purchase for taxes." Harris received the rents and profits of the premises up to the time he conveyed to Courtney.

Courtney claims that he and his grantor have been in exclusive adverse possession of said premises for three years,

four months, and thirty-three days, under their tax deed, before the commencement of this action: and that thereby he has obtained an absolute title under the special limitation of three years of the revenue law.

Sec. 105 of the revenue law of 1869, as amended in 1871, was as follows: "Any person or persons or county purchasing any lands or town lots at any private sale for taxes levied on lands sold under the provisions of this act, shall, after the lapse of three years from the time of recording the treasurer's deed therefor, acquire a complete and perfect title thereto, and all other persons claiming title to any such lands or lots shall, after the lapse of three years from said date, be debarred from commencing or sustaining any action in any court of this state to recover possession of the same, and the courts of this state are hereby prohibited from entertaining or sustaining any such action." Gen. Stat., 933.

This act was repealed in 1879 without a saving clause as to limitations, and the following section enacted: "No action for the recovery of real property sold for non-payment of taxes shall lie unless the same be brought within three years after the treasurer's deed is made as above provided; *Provided*, That where the owner of such real property sold as aforesaid shall, at the time of such sale, be a minor, or insane, or convict in a penitentiary, or under any other legal disability, three years after such disability is removed shall be allowed such person, his heirs, or legal representatives to bring such action." Comp. Stat., 425.

In *State v. McColl*, 9 Neb., 203, where the new act was copied verbatim from the old, it was held to be a mere continuation of the former act—that there was no change in the law, citing *Fullerton v. Spring*, 3 Wis., 671. *Wright v. Oakley*, 5 Met., 406. And this rule undoubtedly applies in all cases where the new law contains the same provisions as the old. But where the provisions of the two acts are entirely dissimilar we are not aware of any case in which

it is held that, upon the repeal of the old law without a saving clause, the new act will continue the provisions of the old in force. By the terms of the former act it is declared that after the lapse of three years from the time of recording the treasurer's deed the purchaser shall acquire a complete and perfect title to lands purchased, and the claimant shall be debarred from bringing or the courts from sustaining an action to recover such land; by the present law the action must be brought within three years after the execution of the treasurer's deed. The power of the legislature to declare that an owner shall be divested of his property without a hearing, and that the courts of the state in a proper case shall not grant him relief, is very doubtful. And in no event could it be done under the general title of the revenue law. Nor is there anything so peculiarly sacred about a tax purchase—a purely business transaction—as to render it an unfit subject for judicial investigation. The legislature may fix a reasonable time within which an action shall be brought or the party be barred. The benefit of the statute, like any other personal privilege, may be waived, and will be unless pleaded. But when an act merely limits the time within which a bad title will ripen into a good one it is not, either in spirit, purpose, or effect, a statute of limitations. Cooley on Taxation, 376. We hold, therefore, that the revenue law of 1869 as amended in 1871 having been repealed without a saving clause before it had run in Courtney's favor, he derives no benefit from the same, and the action is not barred.

Second. It is clearly shown that Manning paid to the tax purchaser \$79.20, under an agreement to redeem. The terms do not seem to have been very definitely fixed, nor was it necessary that they should be. The money was paid and accepted, and the tax purchaser could not, after receiving nearly one-half of the tax, proceed to take the title and hold as owner. Nor does he seem to have done so. He recognized the right of Manning to redeem, and the inser-

tion of the peculiar provision in the deed to Courtney was notice to him of any equities which Manning may have in the property. Courtney was not therefore a bona fide purchaser, and holds the property subject to the right of redemption as hereinafter provided. Objection is made to Manning's right to redeem, because he has not paid the amount of redemption money to the treasurer of Lancaster county, as required by sec. 119 of the revenue law; but the provisions of that section apply only to cases where the owner seeks to redeem according to the mode prescribed in the statute. In this case Manning seeks to redeem under the agreement and not under the provisions of section 119. That section therefore has no application.

Third. Taylor claims as purchaser on an execution sale. The execution was issued on a deficiency judgment after certain mortgaged property had been exhausted. The real estate in question was appraised at \$5,000; certain tax liens, including the tax deed in question, were deducted. The plaintiff's bid was \$2,250. The statute does not mention tax deeds as proper for the appraisers to consider. They cannot determine whether the deeds are valid or not. The land is levied upon as belonging to the debtor. The appraisers are to value it as his property less the liens which the records show to exist against it; not to try titles. Any other rule would permit the appraisers, when called upon merely to appraise the value of a certain piece of real estate and deduct liens, to determine that the debtor had been divested of his title. The object of an appraisement law is to protect the debtor, and the court should see to it that the law is carried out in its spirit, and where it is apparent that the appraisement has not been fairly made to set the sale aside at once. From the cases that come into this court it is apparent that not infrequently the appraisers, instead of confining themselves to their duties under the statute, proceed to determine titles, and thus make the appraisement law an engine of oppression to the debtor. The sale

was confirmed by the court and a deed made to the plaintiff, who at once instituted an action to restrain the sheriff from paying the money over, upon the ground that he would obtain no title from Manning and therefore he would obtain nothing from his purchase. It appears that the execution, although in proper form, did not have the seal attached to it, and it is claimed that therefore it was void. It seems that after the sale and confirmation thereof leave was asked and given to amend the execution by attaching the seal to the same. Was the execution without a seal void? We think not. It is true a large number of cases may be found, principally under the common law, where it is held that the absence of a seal, where one is required by the statute, will render the writ void. But why should it be void if in proper form, issued by the proper officer, and upon a valid judgment? It was issued by an officer of the court and the neglect was the fault of such officer and not of the parties. It has been held that an execution was amendable where it was tested the year after its issue. *Jackson v. Bowling*, 10 Ark., 578. Or by correcting the name of the place where it was tested. *Simons v. Gurney*, 5 Taunt., 605. *Porter v. Goodman*, 1 Cow., 413. Or where the seal, as in this case, was omitted. *Arnold v. Nye*, 23 Mich., 286. *Corwith v. State Bank*, 18 Wis., 560. *Bridewell v. Mooney*, 25 Ark., 524. *Sawyer v. Baker*, 3 Me., 29. The writ is clearly amendable by affixing the seal to the same, and being so it is not void. And the amendment being matter of mere form, which did not affect the substantial rights of the parties, related back to the time of issuing the execution. This objection therefore is not well taken.

* *Fourth.* A more serious objection is made to the plaintiff's title in the fact that the property is shown to have been worth at the time of the purchase about \$10,000; that Courtney by stating that he had a deed from Manning for the property, prevented those who desired to purchase

Taylor v. Courtney.

from bidding; that had there been competition the property would have sold for a very much larger sum; that the plaintiff was aware of this statement and took advantage of it to obtain the property for a sum greatly below its value; that then instead of relying on his title, he at once instituted proceedings to determine whether or not Courtney had a deed from Manning for the premises. If he had, then the plaintiff asked for a return of the purchase money. He evidently was not a purchaser in good faith, and he recognized this fact as the evidence shows, by offering Manning since the sale was made, \$2,000 to convey his interest. The confirmation of a sale merely applies to the regularity of the proceedings. It does not affect equitable grounds for relief which prevented a fair sale, and which were unknown to the parties, and not before the court when the sale was confirmed. It is the duty of a court to see that sales under its process are fairly conducted, competition invited and encouraged, and that no undue advantage is obtained over the debtor. It is very clear that an undue advantage over Manning was obtained in this case, for which the sale must be set aside.

The judgment of the district court is reversed, the sale of the premises to Taylor set aside, and Manning will have leave upon the payment of all taxes and interest, to redeem from the tax sale. As Courtney has been in possession for several years, receiving the rents and profits, it will be necessary to appoint a referee to take and state an account between the parties. A decree will be entered in this court in conformity to this opinion.

DECREE ACCORDINGLY.

LAKE, CH. J., concurs.

COBB J., dissents from the first and second clauses of the syllabus.

15	200
17	365
17	406
15	200
31	561
15	200
36	790
15	200
40	577
15	200
43	330
15	200
56	397
15	200
60	799
15	200
65	652

ADELINE KEENE, PLAINTIFF IN ERROR, V. HANS SALLENBACH, DEFENDANT IN ERROR.

1. **Attachment: LIEN.** Where an attachment is levied upon real estate belonging to the debtor, whether held in his own name or not, the attaching creditor acquires a lien upon the interest of the debtor in the land which he may enforce after he recovers judgment.
2. **Fraudulent Conveyance: SERVICE BY PUBLICATION.** Lands in this state which have been conveyed to a non-resident of the state, to hinder or defraud creditors, may be subjected to the payment of the debts of the actual owner thereof, and service may be had upon the holder of the legal title residing out of the state, by publication.
3. **Sale on Execution: RIGHTS OF PURCHASER.** Where, under a judgment on constructive service, certain lands were found to belong to the debtor, and were subjected to the payment of the judgment, and a sale was had and the lands sold to a *bona fide* purchaser, Held, That he was entitled to protection, although afterwards the judgment was vacated and set aside.

ERROR to the district court for Lancaster county. Tried below before GASLIN, J., sitting for POUND, J.

Brown & Ryan Brothers, for plaintiff in error, cited; *Milhop & Kingman v. Doane et al.*, 31 Iowa, 400, and cases cited. *Frazier v. Mills*, 10 Neb., 113. *Morrill v. Taylor*, 6 Neb., 246. *Galway, Semple & Co. v. Malchow*, 7 Neb., 285. *Mansfield v. Gregory*, 11 Neb., 298. *Bessett v. St. Albans Hotel Co.*, 47 Ver., 313. *Day v. Washburn*, 24 Howard, 352. *Dodge v. Griswold*, 8 N. H., 425. *Mills v. Block*, 30 Barb., 550. *Almy v. Platt*, 16 Wis. 172. *Weinland v. Cochran*, 9 Neb., 480. *Crowell v. Horacek*, 12 Neb., 622. *Williams v. Lowe*, 4 Neb., 382.

Lamb, Billingsley & Lambertson, for defendant in error, cited: *Greenway v. Thomas*, 14 Ill., 271. *Getsler v. Saroni*, 18 Ill., 511. *Dewey v. Eckert*, 62 Ill., 218. *Wil-*

liams v. Michénor, 11 N. J. Eq., 520. Drake on Attachment. *Cooper v. Reynolds*, 10 Wallace, 308. Civil Code, § 82. *Howard v. Entreken*, 24 Kan., 428. *Taylor v. Boyd*, 3 Ohio, 354.

MAXWELL, J.

This is an action of ejectment brought by the plaintiff against the defendant in the district court of Lancaster county to recover the possession of the east half of the south-west quarter of section 22, in township 10, range 7 east. Judgment was rendered in the court below in favor of the defendant.

It appears from the record that in 1874 Hiram B. Keene and Nathaniel S. Keene, who were engaged in business in this state, became insolvent. Actions by attachment were commenced against them by some of their creditors, personal service being had, and the land in question attached as their property, although the legal title to the same was in the name of Josiah Keene, the father of said Hiram and Nathaniel. Judgments were afterwards recovered in these actions, and executions issued thereon, which were returned unsatisfied. Said judgments were assigned to one Clinton B. Jacobs, who filed a creditor's bill against Josiah, Hiram, and Nathaniel Keene seeking to subject the land in controversy to the payment of the judgments.

Josiah Keene being a non-resident of the state, service was had upon him by publication. It is alleged in the creditor's bill that the attachments were never discharged, but remain in full force; that at the date of the levy of said attachment, the real estate above described belonged to Nathaniel S. Keene and Hiram B. Keene, although the legal title to the same was in the name of Josiah Keene; but that he was not the owner thereof, nor ever possessed any interest therein; that the title to said land was placed

in his name by Nathaniel S. Keene and Hiram B. Keene for the purpose of hindering, delaying, and defrauding their creditors, etc. The prayer of the petition is to exclude Josiah Keene from all right, title, or interest in said land and to subject the same to the payment of the aforesaid judgments. A decree was rendered as prayed, and the land ordered to be sold as the property of Hiram B. Keene and Nathaniel S. Keene. A sale was thereafter had and confirmed, and the defendant became the owner of said land, while the above decree was in full force, and it is clearly shown that he purchased in good faith. In September, 1877, Josiah Keene died, having made a will wherein he devised the land in question to the plaintiff.

In 1880 she made application to open the default in the case of *Jacobs v. Nathaniel S. Keene, Hiram B. Keene, and Josiah Keene*, and the application being granted, she filed an answer, and it was afterwards determined that the land in dispute was the property of Josiah Keene, and not of Nathaniel S. Keene and Hiram B. Keene.

The power of the court, upon proper application to apply property within its jurisdiction to the payment of debts, is unquestioned. Two questions therefore are presented by the record. First, Can a creditor's bill be sustained after judgment to subject lands previously attached as the debtor's, but held in the name of another who is a non-resident, to the payment of a judgment? Second, Is a *bona fide* purchaser under a judgment, declaring the lands to belong to the debtor, protected, the judgment being in full force, and no appeal having been taken?

In *Weil & Cahn v. Lankins*, 3 Neb., 384, a creditor levied an attachment upon certain real estate as belonging to the debtor, and at once, before he had recovered judgment, filed a creditor's bill to set aside certain alleged fraudulent conveyances of the attached real estate. It was held that the action would not lie, because the plaintiff's claim was a mere *demand* and had not been reduced to

judgment. Such demand might be one for which the remedy by attachment would not lie, as for slander, malicious prosecution, etc., or it might be entirely unfounded. It therefore lacks the certainty which the law requires as one of the grounds upon which to found a creditor's bill. But where sufficient cause is shown for an attachment, and one is issued and levied upon real estate belonging to the debtor, whether held in his own name or not, the creditor acquires a lien upon the interest of the debtor in the land, which he may enforce after the recovery of judgment. Where in such case it is necessary to set aside a conveyance alleged to be fraudulent as to creditors, an action may be commenced for that purpose against the alleged fraudulent grantee and other proper parties, and it is the duty of the court to render such decree in the premises as the testimony will justify. The fact that the party holding the legal title to the land is a non-resident of the state is not material if the property is within the jurisdiction of the court, as the statute in such cases provides for service by publication. The court therefore had jurisdiction and its judgment until vacated or reversed was valid, and sufficient to justify a sale of the premises under the attachment.

2. The objection that the plaintiff herein, after the defendant had purchased the land in controversy, appeared in the case of *Jacobs v. Keene* and filed an answer therein, and it was afterwards found that Josiah Keene was the owner of said land, and not Nathaniel S. and Hiram B. Keene, does not affect the defendant's title, although it may perhaps be sufficient to enable the plaintiff to recover damages against Jacobs. But the statute provides that a bona fide purchaser shall be protected. This question was before the court in *Scudder v. Sargent*, ante p. 102, and it was held that a purchaser under a judgment subsequently opened is not affected by the vacation of the judgment. We adhere to that decision as a proper construction of the

statute. There is no error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

15	204
16	304
17	138

15	204
50	822
52	443

WALLINGFORD, SHAMP & Co., PLAINTIFFS IN ERROR,
v. L. C. BURR, DEFENDANT IN ERROR.

1. **Sale.** When anything remains to be done between the buyer and seller before the goods are to be delivered, a present right of property does not attach in the buyer.
2. ———: **EXECUTORY CONTRACT.** An agreement to sell and transfer property at prices to be afterwards determined, is an executory contract.

ERROR to the district court for Lancaster county. Tried below before GASLIN, J., sitting for POUND, J.

Brown & Ryan Brothers, for plaintiffs in error, cited, *inter alia*: *McDonald v. Hewitt*, 15 Johns., 349. *Kein v. Tupper*, 52 N. Y., 550-552. *Strauss v. Ross*, 25 Ind., 300. *Schneider v. Westerman*, 25 Ill., 514. *Shaw v. Nudd*, 8 Pick., 9. *Hunter v. Hutchinson*, 7 Pa. St., 140. *Dempsey v. Gardner*, 127 Mass., 381. *Watson v. Rogers*, 53 Cal., 401. *McCoy v. Clapp*, 47 Iowa, 418. *Benjamin Sales*, § 320 *et seq.*, 374 and cases cited. *Langdell Sel. Cases*, 464, 529, 1010. 2 *Sutherland Damages*, 353. *Barrett v. Turner*, 2 Neb., 174. *Goodman v. Kennedy*, 10 Id., 272.

O. P. Mason, for defendant in error.

MAXWELL, J.

In January, 1882, the plaintiffs and one Henry Keefer entered into an agreement, as follows: "It is hereby stip-

Wallingford, Shamp & Co. v. Burr.

ulated and agreed between Henry Keefer, as party of the first part, and J. Shamp, J. S. Wallingford, and J. Delos Brown, as parties of the second part, that said party of the first part *shall* sell and transfer to said parties of the second part certain goods and implements, including cultivators, plows, harrows, and such other salable implements as he may have and own, at actual cost of said goods to him, said cost to include carriage of goods but no storage. Also transfer to said parties of the second part the lease held by him on the building he now occupies, also his good-will in trade. Also to sell the said parties of the second part one team of horses and two second-hand spring wagons at such reasonable prices as may be agreed upon. And the said parties of the second part agree to receive said goods as per said stipulation, and pay to the said party of the first part for said goods one thousand dollars cash, and whatever balance may be coming to him from them at any time between this present date and January 1st, 1883, as may be agreed on, the prices of said goods aforementioned to be decided by his bills, contracts, and discounts on the lines of goods in which they are included. Said party of the first part further agrees not to enter into or conduct any farm implement business in this city for the space of two years from this date. Said parties of the second part further agree to assume such of said first party's contracts with manufacturers for the sale of their goods for 1882 as they may be able to renew. Said party of the first part further agrees that on all contracts made with parties for weighing and room rent, on which he may have received advanced moneys, to return or pay to the parties of the second part such part of said money as may apply for work or rent of said rooms after date of transfer of said business to said parties.

"In witness whereof we hereunto subscribe our names.

"HENRY KEEFER,

"J. S. WALLINGFORD,

"J. SHAMP,

"J. D. BROWN."

Keefer was engaged in the business of selling farm machinery in Lincoln, and owned some of the implements and articles kept by him for sale, and also kept for sale goods on commission. The work of making an invoice of the stock commenced on the ninth of January, 1882, and seems to have continued until the seventeenth, when it was completed and the prices agreed upon. It appears that the plaintiffs required a bill of sale in order that there would be no mistake about the property they had purchased from Keefer and that which he held on commission. Keefer seems to have consented to this, and it was agreed that Shamp should go to an attorney's office and have one prepared. Shamp thereupon went to an attorney's office and had a bill of sale prepared, and returned to the store, and while Keefer was examining the same preparatory to signing it, the sheriff came in with an execution against Keefer & Lindley, and levied upon the goods as belonging to Keefer, and sold the same upon said execution, the aggregate amount of the sales being the sum of \$1,485.85. Keefer thereupon assigned the above contract and all his rights thereunder to the defendant in error, who brought this action thereon, and on the trial a verdict was rendered in his favor for the sum of \$2,529.28. A motion for a new trial having been overruled, judgment was entered on the verdict.

The only question for determination is, was the sale to the plaintiffs in error complete when the execution was levied? It will be observed that the agreement copied above does not purport to be a completed sale. It is merely an agreement that the party of the first part *shall* sell and transfer his goods and business to the parties of the second part, and transfer the lease of the store and good-will to them, and *to* sell one team of horses and two spring wagons at such reasonable prices as may be agreed upon. So, the parties of the second part are *to* receive said goods as per said stipulations, and to pay \$1,000 in cash and the balance

with interest at not to exceed seven per cent at such time as may *be agreed* on between that time and January 1st, 1883. Such a contract is merely executory. And although afterwards the terms were agreed upon, still the contract was not completed by the execution of the bill of sale and the delivery of the goods to the plaintiffs in error and payment of the \$1,000 cash, nor was any evidence of indebtedness given for the balance due. A clear preponderance of the evidence shows that Keefer was to execute a bill of sale of the goods sold, and that he was examining the same preparatory to signing it when the execution was levied. If anything remains to be done between the buyer and seller a present right in the property does not attach in the buyer. 2 Kent's Com., 495, and cases cited. In this case it is clear that the parties themselves did not consider the sale complete at the time the execution was levied. Mr. Keefer not having delivered the property in any manner, the title had not passed to the plaintiffs in error.

In October, 1879, one A. W. Chilcot commenced an action in the district court of Lancaster county against Henry Keefer and Samuel P. Lindley, as partners, and recovered a judgment for the sum of \$4,047.74, with 12 per cent interest and \$120 attorney fees. To obtain this judgment the attorney for Chilcot entered into the following agreement:

"A. W. Chilcot v. Keefer & Lindley."	}	In the district court of the second judicial district in and for Lan- caster county.
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"In consideration of one dollar to me in hand paid, I hereby agree not to issue execution in this case against the individual property of Henry Keefer, and do hereby release the individual property of Henry Keefer from the lien of the judgment to be obtained in this suit, without prejudice to my lien and right of execution against the property of the late firm of Keefer & Lindley, and without

prejudice to the right of contribution of S. P. Lindley against Henry Keefer.

"Lincoln, Oct. 3, 1879.

"A. W. CHILCOT,

"By L. C. BURR,

"Specially authorized to act for above stipulation."

The testimony tends to show that the object of recovering the judgment was to obtain a lien upon a lot claimed by Keefer & Lindley. The execution under which the property in question was sold was issued on the above judgment. The above agreement of Chilcot's attorney was read to the court but not admitted in evidence. Some stress, however, is laid upon it in the defendant's brief. As between Keefer and Chilcot, if the attorney was duly authorized and there was a sufficient consideration, as by the surrender of a valid defense, or in any other way, there is no doubt of its validity. But these plaintiffs could not take advantage of the agreement. It was for Keefer to do so, and prevent the sale of the goods upon the execution. The defendant claims that he purchased the claim in question relying upon the plaintiff's admissions of indebtedness. It is very clear, however, that he knew, or with proper inquiry could have known, all the facts in the case, and is not an innocent purchaser. He took only the interest possessed by Mr. Keefer in the claim. The property was sold as belonging to Keefer, and, so far as appears, without objection from him. His debt to the amount realized for the property has been satisfied. Unless it is satisfactorily shown that he had delivered the property—done all that he was to do to part with the title—it must be treated as his property which was applied to the payment of his debt. The plaintiffs in error should not be required to pay for property that they did not receive, unless through their own fault it was lost. This we think the proof fails to show. But for the goods obtained by them which were held on commission, for the store and good-will, and any other

property they may have received, they are liable. They are not liable, however, for the property sold by the sheriff. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

QUIN BOHANAN, PLAINTIFF IN ERROR, V. THE STATE OF
NEBRASKA, DEFENDANT IN ERROR.

1. **Criminal Law: PLEA IN ABATEMENT.** A plea in abatement may be signed by the prisoner's attorney. If so signed, and verified by the prisoner, it is sufficient.
2. ———: ———. If the plea contain a material averment on which issue is joined, it is error for the court to refuse the prisoner a trial of it.
3. ———: **NEW TRIAL.** The ruling of the court on a plea in abatement is not ground for a motion for a new trial.
4. **Jurors.** The "list" of persons prepared by the commissioners, from which jurors are drawn, may be made on the basis of the vote of the several precincts at the last general election.
5. ———: **CHALLENGE OF.** Although there may be error in overruling a challenge to a juror for cause, yet if the prisoner be not compelled to exhaust his peremptory challenges to exclude him from the panel, it is error without prejudice.
6. **Instructions to Jury.** Instructions examined and sustained.
7. **Murder in Second Degree.** A malicious killing, although done upon a sudden quarrel and in the heat of passion, is, at least, murder in the second degree.

ERROR to the district court for Lancaster county. Tried below before POUND, J., where the prisoner was convicted of murder in the second degree and sentenced to the penitentiary for life.

15	209
18	59
18	404
15	209
26	390
15	209
40	13
15	209
46	887
15	209
50	155
51	686
53	831
15	209
58	214

Mason & Whedon, for plaintiff in error.

Isaac Powers, Jr., for defendant in error.

LAKE, CH. J.

Taking up the errors alleged in the order of their presentation by the prisoner's counsel, the first to be considered is the one assigned upon the plea in abatement.

The record contains the plea, the reply of the district attorney thereto, and a demurrer to the reply. Also a motion, filed subsequently to the demurrer, to require the reply to be made more definite. The demurrer and motion were overruled; whereupon the prisoner asked leave to sign his plea in abatement, which was overruled. It had already been signed by his attorneys. Exceptions were taken to these several decisions.

There was no error in refusing the personal signature of the prisoner to the plea. The signature of his attorneys was sufficient, it having been duly verified by his own oath. Besides, even if in order to have been technically correct the personal signature of the prisoner in place of that of his attorneys had been necessary, this technicality was waived by the filing of the reply. It was thereby accepted by the prosecution as sufficiently formal, and the only question concerning it was that of merit.

The plea in abatement asserts the illegality of the grand jury in this, that the "list" of persons from which the jurors were drawn was not composed of persons taken in due proportion from each of the several precincts of the county, as directed by sec. 658, of the code of civil procedure. That the disproportion was from one to three, more or less, in several of the precincts. The plea simply asserts this departure from the required ratio, and that it was caused by a total "disregard of the law" by the county commissioners in making the list.

To all of this the district attorney by his reply opposed what is in effect a general denial. The *first* clause of his reply is in terms a general denial; and by the *second* clause, it is simply alleged in substance that the commissioners made the selection, "as nearly as could be, a proportionate number from each precinct in said county." There is no mention of how, or on what particular basis, the ratio adopted by the commissioners was determined. In this respect, if the law had been really observed, the reply might have been improved upon. If the commissioners took the best means at their command, as for instance, the vote of the precincts at the last general election, the reply should have so stated. In that case, if the apportionment conformed to it as nearly as practicable, it would have been valid, although not conformable to the actual ratio of qualified voters then living in the several precincts. *Polin v. The State*, 14 Neb., 540.

Although they are somewhat crude, the pleadings present an issue of fact squarely as to whether the list of jurors was properly selected. And on this issue, the prisoner had the right to produce the evidence he offered, and be heard. If the disproportion alleged on the one hand and denied on the other actually existed, on the basis adopted by the commissioners, or, if they adopted no basis at all, or an unfair one, and there existed in fact the alleged disproportion as to persons in the several precincts qualified to serve as jurors, then the list was illegal and the plea well taken. Such being the condition of the pleadings, and the character of the issue made by them, the ruling of the court in denying a trial of it was clearly erroneous.

But, it has been suggested that inasmuch as this point was not made in the motion for a new trial, it was waived and is not now available to the prisoner. This, however, is a mistake. The idea is based upon a misconception of the province of a motion for a new trial, by which only such rulings as are made during the trial proper, are intended

to be reviewed, and corrected by granting it. "A new trial, after verdict of conviction, may be granted on the application of the defendant, for any of the following reasons, affecting materially any of his substantial rights: *First.* Irregularity in the proceedings of the court or the prosecuting attorney, or the witnesses for the state, or any order of the court, or abuse of discretion, by which the defendant was prevented from having a fair trial. *Second.* Misconduct of the jury or the prosecuting attorney, or of the witnesses for the state. *Third.* Accident or surprise which ordinary prudence could not have guarded against. *Fourth.* That the verdict is not sustained by sufficient evidence, or is contrary to law. *Fifth.* Newly discovered evidence, material for the defendant, which he could not with reasonable diligence, have discovered and produced at the trial. *Sixth.* Error of law occurring at the trial." Criminal code, § 490.

The grounds here enumerated are the only ones for which a new trial can be properly moved, and it is very clear that neither of them embraces a ruling on a plea in abatement, or any other not made during the trial. The object of this plea was to prevent a trial, and if it had prevailed, such would have been its effect. And the ruling on it is no more subject to review by a motion for a new trial, than is the overruling of a demurrer to a petition in a civil action, which no one surely would think of contending for. Rulings respecting the indictment, or after verdict, are subject to review on error without bringing them to the notice of the court a second time.

Several questions are presented respecting the competency of petit jurors, some of which deserve notice. The juror J. H. Simmons was challenged on behalf of the prisoner for the reason that on his *voir dire* examination he answered that he could not presume the prisoner "to be innocent." The entire examination of this juror shows him to have been wholly impartial. He swore positively that

he had no opinion as to the prisoner's guilt or innocence, and knew nothing of the case except that the deceased had been killed. On his cross-examination by counsel for the prisoner he was asked: "Do you, or do you not presume him innocent?" and answered: "I could not say as to that, because I have not heard the particulars of the case one way or the other, and have nothing for me to pass an opinion on." This question followed: "As far as you are concerned, you have no presumption regarding the defendant?" The answer was, "I have not." In answer to other questions the juror insisted that he had "no opinion, one way or the other," and could not "presume him to be innocent or guilty." It is evident that in his several answers he used the word "presumption" as synonymous with "opinion," and the two interchangeably. The form of the questions put to him tended somewhat to lead him to this mistake. There is nothing, however, in anything he said to indicate the least unwillingness to extend to the prisoner the presumption of innocence until shown to be guilty by evidence. And these remarks are applicable to one or two other jurors who were retained against the prisoner's objection.

The examination of William Burling shows that he could not be positive whether he had read the testimony taken at the coroner's inquest or not. But he had an opinion on the question of the prisoner's guilt which would require testimony to remove, and he would not, although seemingly pressed to do so by the presiding judge, swear positively that, notwithstanding his opinion, he felt able to render a fair and impartial verdict on the law and evidence given in court. The challenge of this juror for cause ought to have been sustained, but as he did not sit in the case, having been excused or challenged peremptorily, and it not being shown that to exclude him the prisoner was compelled to exhaust his right of challenge, the overruling of it caused no injury.

We see no errors respecting the impaneling of the jury for which the verdict should be set aside.

Several of the exceptions relate to the charge of the court to the jury. The second instruction given was excepted to. It was as follows: "To constitute murder in the first degree there must have been an unlawful killing, done purposely and with deliberate and premeditated malice. If a person has actually formed the purpose maliciously to kill another, and deliberated and premeditated upon it before he performs the act, and then performs it, he is guilty of murder in the first degree, however short the time may have been between the formation of the purpose and its execution. The length of time that intervenes between the time such purpose is formed and its execution is not material."

Under the evidence we think this instruction was warranted. The jury would have been justified in finding that, between the commencement of the quarrel and the shooting of deceased, there was length of time sufficient for the prisoner to have formed the purpose to kill and to have deliberated upon it. The time was by no means inappreciable, by the decided weight of the evidence and the question of whether the killing was done with deliberation and premeditation was properly left to the jury. And for these reasons, too, the second instruction tendered on behalf of the prisoner, to the effect that the evidence would not warrant a finding of murder in the first degree, was properly refused.

The court was also requested to instruct the jury that, if the killing were done "upon a sudden quarrel and in the heat of passion, they should find the defendant guilty of manslaughter only." This was refused, and properly, too, for the reason that it ignored completely the effect of malice, if that were found to have accompanied the act. A malicious killing, although done upon a sudden quarrel and in the heat of passion, is murder in the second degree at least.

Hunter v. Soward.

The court was also requested to give the following, which was refused: "Manslaughter is the unlawful killing of another without malice, either express or implied, which may be either involuntary, upon a sudden heat of passion, or inadvertently, upon the commission of some unlawful act."

As a general definition of manslaughter under our statute this was correct. But it was faulty in this, that the last clause had no application to the evidence. There was no pretense that the act was done "inadvertently upon the commission of some unlawful act." This instruction was, therefore, rightly refused.

For the error in denying the prisoner a trial of the issue taken on his plea in abatement, the judgment must be reversed, the verdict set aside, and the cause remanded to the court below for further proceedings conformable to this opinion.

REVERSED AND REMANDED.

THE other judges concur.

GEORGE T. HUNTER ET AL., PLAINTIFFS IN ERROR, V.
JOHN C. SOWARD, DEFENDANT IN ERROR.

1. **Attachment:** GROUND FOR. The fact that a debtor designs to sell his property, or to remove it beyond the jurisdiction of a court, when not accompanied by an intent to defraud his creditors, is not ground for an attachment.
2. ———. Affidavits examined, and the order of the district judge discharging the attachment sustained.

ERROR to the district court for Hamilton county. Heard below before GEORGE W. POST, J.

P. Likes and *J. H. Smith*, for plaintiffs in error.

Hainer & Kellogg and John D. Hayes, for defendant in error.

LAKE, CH. J.

This is a petition in error from Hamilton county. The matter complained of is an order of the judge of the district court, made at chambers, dissolving an attachment of property. The affidavit for the attachment was made by one of the plaintiffs; and it stated as a reason therefor that the defendant was "about to remove" and "dispose of his property, or a part thereof, with the intent to defraud his creditors."

The plaintiffs' demand in the action, as described in the affidavit, was for "the sum of four thousand four hundred and fourteen dollars and ninety-six cents, now due and payable from the defendant upon certain promissory notes, bills of exchange, and receipts for money advanced by plaintiffs to defendant at his request."

The motion to dissolve was upon three grounds, viz.: 1st, That the alleged cause of action was not one on which an order of attachment could rightfully issue. 2d, That the bond given by the plaintiffs was defective. 3d, That the facts alleged in the affidavit for the attachment were untrue. There is no merit in the first point, so far as we can discover. The pleadings in the main action are not in the record before us; nor are the instruments on which the action was brought. Their names and description alone, however, import that they are for the payment of money, which may be enforced by attachment where proper cause is shown. The question raised upon the bond was disposed of by an amendment, so that, apparently, the only one left for consideration is that of the merits of the attachment as disclosed by the several affidavits considered by the district judge. To these we will give our attention.

The only additional showing to that above stated, made

by the plaintiffs, was, substantially, that after incurring his obligations to the plaintiffs he had advertised a sale of his personal property at auction, sold some of it accordingly, and had put his real property in charge of an agent for sale, with the oft avowed design of going "to Wyoming territory to go into the cattle business." Also that he had at different times stated to the plaintiff Tate that he "never intended to pay the plaintiffs anything, or any part of their said claim against him," for the reason "that if he did, it would break him up," and "that he would just as soon be broken up lawing as in paying the plaintiffs' claim against him." These alleged statements of the defendant, except those as to his design to go to Wyoming, are shown only by the affidavit of the one to whom they are said to have been made—James Tate.

On the part of the defendant, the alleged indebtedness to the plaintiff is denied by him. He also denies that he made the statements which James Tate ascribes to him. He admits, however, that it was his intention to go west, with the view of engaging in the cattle business, and to this end he had offered his land for sale. He also shows by his own affidavit, which is not opposed by any but that of the plaintiff Tate, that this design to go to Wyoming was formed before the transactions out of which his alleged indebtedness arose took place, and that he had previously begun to arrange his affairs accordingly. He also shows, and it is not disputed, that, aside from the plaintiff's demand, he was owing only five thousand one hundred and ninety-four dollars and fifty cents, and was possessed of property, personal and real, of the value of twelve thousand seven hundred dollars.

As to the auction sale of his personal property, or rather, a portion of it, he shows by his own oath, corroborated by most of his creditors (save the plaintiffs), who advised him to it, that it was "the most advisable and feasible plan" he could pursue for paying his debts, which were then somewhat

pressing. The plan adopted by him and followed on the advice of his principal creditors was, to make a public sale of his property on time, taking good security therefor, and discount the notes so received, and with the proceeds thereof pay the whole or a portion of the debts so by him at that time owing.

Pursuant to this scheme he sold some sixteen hundred dollars worth of his personal property, and applied the proceeds faithfully toward the payment of his debts. It is true, as the plaintiffs say, that none of the money went to them; but this is accounted for by the fact that theirs was a disputed claim. There was no pretense, however, that the defendant had not enough property to pay all of his debts, including the full amount of the plaintiffs' demand. Indeed, by his own undisputed showing, it was established that he had enough for this purpose and over four thousand dollars to spare, so that any judgment they were possibly entitled to could have been collected by an ordinary execution.

To sustain the attachment, there was really nothing shown but the facts that he refused to recognize the plaintiffs' demand as a binding obligation, and proposed, if he could sell his real estate for a satisfactory price, to remove to the territory of Wyoming and "go into the cattle business." The defendant's purpose to "remove" and "dispose of his property" was established; indeed it was conceded; but the charge that this was accompanied with a "fraudulent intent" was not. The fact that a debtor has formed a design to remove his property beyond the jurisdiction of a court, or out of the state even, when not accompanied by an intent to defraud his creditors, furnishes no ground for an attachment. *Steele v. Dodd*, 14 Neb., 496.

We are of opinion that the ruling of the district judge was right, and it is affirmed.

ORDER AFFIRMED.

ALL of the judges concurred.

ALBERT HALLIDAY, PLAINTIFF IN ERROR, v. B. B.
BRIGGS, DEFENDANT IN ERROR.

15	219
22	654
15	219
30	276
31	845
15	219
145	769
15	219
48	203

1. **Warranty.** To make a representation of the vendor, as to the quality of the thing sold, a warranty, it must have been *relied on* by the vendee.
2. ———. If the vendor merely give his opinion or judgment upon a matter of which he has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment, it is not a warranty.
3. ———. If there be any doubt upon the evidence whether the seller intended to make an affirmation, or to express his own opinion merely, the matter should be submitted to the jury.
4. **New Trial: CUMULATIVE EVIDENCE.** A new trial will not be granted on the ground of newly discovered evidence which is merely cumulative.

ERROR to the district court for Gage county. Tried below before WEAVER, J.

Colby & Hazlett and *A. H. Babcock*, for plaintiff in error. Third instruction. 1 Hilliard Torts, 11, 12, 34. *Pomery Rem.*, § 559. 1 Parson's Cont., 576, n. "h." *Miller v. Nichols*, 5 Neb., 478. *Little v. Woodworth*, 8 Id., 281. Fourth instruction. *Smith v. Justice*, 13 Wis., 674. Hilliard Sales, 342.

J. E. Bush, *J. N. Rickards*, and *Hurley & Crane*, for defendants in error, cited: *Adams v. Johnson*, 15 Ill., 345. *Hawkins v. Berry*, 5 Gil., 36 (Ill.) *Towell v. Gatewood*, 2 Scam., 23 (Ill.) *Hahn v. Doolittle*, 18 Wis., 196. *Smith v. Justice*, 13 Wis., 671. *Reed v. Hastings*, 61 Ill., 266. *Carondelet Iron Works v. Moore*, 78 Ill., 65. *Baker v. Henderson et al.*, 24 Wis., 509. *Shakelton v. Lawrence*, 65 Ill., 175.

LAKE, CH. J.

This was an action on an alleged warranty in the sale of two horses by the defendant to the plaintiff. It was alleged in the petition and denied in the answer, that as an inducement to the purchase, the defendant warranted the horses to be "all right, sound and free from disease," and that the "plaintiff, relying upon said warranty, purchased said horses from the defendant for the sum of sixty dollars," etc. That the "horses at the time of the sale were diseased and unsound in this," that both of them "had a contagious and infectious disease, known as the Texas mange, or Spanish fever, of which disease one of said horses soon after said purchase died, and the other became worthless," etc. The trial resulted in a verdict and judgment for the defendant. There was a motion for a new trial which was overruled, and several questions thus made are brought here review.

The first of the errors assigned is, that the verdict is not supported by the evidence. We think it is. For, even conceding that the defendant used the language imputed to him by the plaintiff and his witness, Pace, who alone testify to it, the jury, under the circumstances, may well have believed it to have been intended, and understood, as the mere expression of an opinion, and not as a warranty; especially so in view of the fact that there was not a syllable of testimony showing it to have been *relied on* in making the purchase. The rule is, that, to make a representation of the vendor as to the quality of the thing sold a warranty, it must have been relied on by the vendor. *Hahn v. Doolittle*, 18 Wis., 196. *Smith v. Justice*, 13 Id., 600. *Reed v. Hastings*, 61 Ill., 266. *Whitney v. Sutton*, 10 Wend., 413. *Little v. Woodworth*, 8 Neb., 281.

According to the plaintiff's testimony, the words constituting the alleged warranty were used under these circumstances. The plaintiff, it seems, offered for the horses a less

price than was asked. This the defendant refused, saying that the plaintiff had picked out "two of the best in the herd," that they were "sound and all right, and he would not take any less" than the price he had offered them for, which was thirty dollars each. It does not appear that the soundness of the horses was questioned, nor that the subject of warranty was mentioned by the plaintiff. He went into the herd and selected two that pleased him, and it is pretty clear that he acted on his own judgment. But even if it were shown that the plaintiff really purchased on the strength of what he claims the defendant said, it is doubtful whether it amounted to a warranty, under the circumstances. At all events, a court would not be justified in holding that it did, against the finding of a jury.

But in addition to this, the defendant swore positively that he did not use the words charged, nor any others amounting to a warranty. Therefore the question of whether he did, or not, was one peculiarly for the jury to determine. *Blackburn v. Ostrander*, 5 Neb., 219.

It is also claimed that the court erred in giving to the jury the third instruction asked by the defendant. It was in these words. "The jury are instructed that, while it is true, if the seller of personal property asserts as facts, anything regarding its qualities and concerning which the buyer is ignorant, and the purchaser relies on the statement in making the purchase, the assertion will amount to a warranty of the fact asserted; still, it is also true that if the vendor merely states an opinion, or gives his judgment upon a matter of which he has no special knowledge, and upon which the buyer also might reasonably be expected to have an opinion, and to exercise judgment, this is not a warranty."

The first proposition in this instruction states the law correctly. See the authorities *supra*. Indeed, we do not understand that its soundness is questioned. But, it is claimed that the second proposition "is misleading, and

confounds the distinction between an action on a contract of warranty, and one for deceit in making fraudulent representations," etc. We do not think the instruction is open to this criticism. In Benjamin on Sales, § 613, in speaking on the subject of warranty, language almost identical with that of this instruction is used. It is there said that, in determining whether a warranty were intended, "a decisive test is, whether the vendor assumes to assert a *fact* of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion, and to exercise his judgment. In the former case, there is a warranty—in the latter, not." We are of opinion that both propositions were correct, and, in view of the evidence, the question of whether the alleged statement concerning the soundness of the horses amounted to a warranty, was for the jury to decide. Benjamin on Sales, § 613, note (m).

It is claimed that the court erred also in giving the fourth instruction on behalf of the defendant. It was as follows: "The jury are further instructed, that to constitute a warranty, there must not only be an affirmance by the seller respecting the quality of the article sold, *but the affirmation must be made with a view of assuring the buyer of the truth of the fact asserted*, and it must be received and relied upon by the buyer in making the purchase."

Exception is taken to the clause we have italicised, which makes the "view" with which an affirmation respecting the subject of a sale a controlling element in determining its character. The word *view* as here used is equivalent to intention, purpose, or design, and it is insisted that what may have been intended by the seller in making the affirmation was of no consequence, and a case is cited in which it seems to have been so held. In that case, however, the language in question was such that, if used, amounted unquestionably to a warranty, and it was therefore ruled,

Halliday v. Briggs.

correctly no doubt, that its legal effect could not be defeated by the secret intention of the seller. Where the evidence is such as leaves no doubt as to the legal force of the language of the representation, the court may, and should, declare its effect, but otherwise it should be left to the jury to determine. *Whitney v. Sutton*, 10 Wend., 412. *Tuttle v. Brown*, 4 Gray, 457. *Morrel v. Wallace*, 9 N. H., 111.

The true aim in construing every agreement, that of warranty included, is of course to reach the real intention of the parties to it. This is accomplished, not by taking what they may afterwards say their intentions were, but what they appear to have been from the words employed, the occasion of using them, and all accompanying facts and circumstances explanatory thereof. The instruction might probably have been improved upon by directing the jury to the means of ascertaining the "view" of the seller, if he made the affirmation, but, as this was not requested, the omission to do so is not ground of error. More especially so as there was no evidence whatever of any secret intention on the part of the seller, whose defense was simply that he did not make it.

In the several rulings complained of respecting the admissibility of testimony, and newly discovered evidence as ground for new trial, we see nothing materially wrong, or which calls for extended comment. There was nothing in the circumstances of the alleged warranty, which by any possibility could have made the defendant liable upon it beyond the difference between the value of the horses as they actually were, and what it would have been if sound. That which is claimed to have been newly discovered evidence, we think, was merely cumulative, for which a new trial will not be given.

JUDGMENT AFFIRMED.

THE other judges concur.

MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN
ERROR, v. JESSE L. HAYS, DEFENDANT IN ERROR.

1. **Practice: NEW TRIAL.** The granting of a new trial will not be interfered with unless it is clearly shown that some legal right of the party objecting has been disregarded.
2. ———: **MOTION FOR.** Where a motion for a new trial is made for reasons which would not otherwise be apparent from the record, they should be incorporated in a bill of exceptions.
3. ———: **EVIDENCE: RECORD OF: PLAT.** Where, in the assessment of damages for right of way for a railroad by a jury, a plat of the land, showing the location of the road, etc., is used, a record of the evidence is not complete without it.
4. **Eminent Domain: ASSESSMENT OF DAMAGES.** In making such assessment, it is proper to consider the way in which the road cuts the land, the inconvenient shape in which the residue is left, the excavations and embankments, and the exposure of the owner's property to particular injuries from its proximity to the road, which may result from its proper construction and operation.
5. ———. The valuation of property taken for right of way for a railroad should be made as of the time of the filing of the petition for the assessment of damages to the land.
6. **Bill of Exceptions: CERTIFICATE TO.** Where from an inspection of a bill of exceptions it is apparent that material evidence has been omitted, the certificate that it contains all that was used on the trial will not be taken as conclusive on that point.

ERROR to the district court for Richardson county, where the cause had been brought on appeal by Hays from an award of damages for the location of the right of way of the M. P. R. R. over his land, etc. There was a trial, and a verdict in favor of Hays for \$275. This verdict was set aside on motion of Hays and a new trial granted. At the second trial, before DAVIDSON, J., verdict in favor of Hays for \$860, judgment, motion for new trial overruled, and the R. R. company came up on a petition in error.

John L. Webster, for plaintiff in error, on setting aside first verdict, cited: *Sutherland Dam.*, 810. *Woodward v. Leavitt*, 107 Mass., 453. As to date when damages should be assessed, cited: *Burt v. Merchants Insurance Co.*, 115 Mass., 1. *Mills Eminent Domain*, § 174. *Logansport v. Buchanan*, 52 Ind., 163. *Indiana v. Hunter*, 8 Ind., 74.

J. H. Broady, for defendant in error, contended that granting new trial was discretionary; that the value of the land is to be estimated at time of condemnation, which is the time when it was taken, which is the time the title passes, which is the time the money is ready, which is the time it is paid into the county court, which cannot be before filing of report of assessment. *Sioux City v. Brown*, 13 Neb., 319. *F. E. & M. V. R. R. v. Whalen*, 11 Neb., 588. *Driver v. Railroad*, 32 Wis., 569. *Ray v. A. & N. R. R.*, 4 Neb., 440. *O. & N. R. R. v. Menk*, Id., 24. *Daniels v. Railroad*, 35 Iowa, 129.

LAKE, CH. J.

It is claimed that the court below erred in setting aside the first verdict and granting a new trial. The record before us is not in a condition to show upon what particular ground that ruling was made. In the motion for a new trial several reasons were assigned therefor, followed by the statement that, "Reference is hereby made to affidavits in support of some of the causes herewith filed." There is also appended to the bill of exceptions, but in no way made a part of it, the affidavits of persons representing themselves as members of the jury respecting the deliberations in the jury room, and giving reasons which induced them to finally assent to the verdict after having voted for a much larger one. There is nothing, however, which enables us to know that these are the affidavits referred to in the motion, or that they were considered by the judge in ruling upon it. Indeed, there is nothing in the record to indicate

with certainty just what the ruling was based upon. In this respect the record is strangely defective.

There is a very large discretion given to trial judges in the matter of granting new trials. By this we by no means intend to convey the idea that their rulings in this respect are not subject to review by appellate courts, but simply that, before they will be interfered with, it must be clearly shown that some legal right of the party objecting has been disregarded. *Woodward v. Leavitt*, 107 Mass., 453 (9 Am. Repts., 49).

Among the grounds assigned in the motion for the new trial are, 1st, "Irregularity in the proceedings of the jury, and of the said plaintiff." 2d, "Misconduct of the jury, and particularly of the two members, Spence and Klever, and misconduct of the said plaintiff." These were good reasons, if proved, for setting the verdict aside. Code of civil procedure, § 314. And that they were proved must be presumed in the absence of a showing to the contrary. *Credit Foncier v. Rogers*, 10 Neb., 184. *Frey v. Drahos*, 7 Id., 194. *Deroin v. Jennings*, 4 Id., 97. *Singleton v. Boyle*, Id., 414. Therefore, if the verdict were set aside on either or both of these grounds, and a review of the ruling were desired, there should have been a bill of exceptions showing just what the judge acted on. The 3d and 4th objections related to the sufficiency of the evidence, and the 5th, to rulings on its admissibility, and in charging the jury, which are, perhaps, fully disclosed by the bill of exceptions of the evidence, and the instructions, which became a part of the record on being filed by the clerk.

Our consideration of the first and second of these objections leads to the conclusion that the order granting the new trial should not be disturbed. But, in addition to this, we are unable to say that the *fifth* objection alone did not furnish a sufficient reason for the ruling complained of. Turning to the record, we discover several rulings upon the admissibility of evidence which were manifestly erro-

neous. For instance, it was shown that, in passing through the farm, the railroad skirted a small creek, and a witness was asked how the location of the track affected its value. This was objected to as "not proper evidence to go to the jury," and the objection sustained. It appeared that the farm was devoted chiefly to pasturage, and in view of that use, it was clearly competent to advise the jury particularly of the effect of a practical separation of the creek from the rest of the land.

Again, it appeared that between the right of way and creek, there was left a small, irregular strip of land, quite difficult of access by reason of the grade of the road. A witness, shown to be competent, was asked without objection, how much in value that piece was injured, and answered, "Ten dollars per acre." On motion of the plaintiff's attorney, this answer was excluded on the ground that the injury was "on account of the difficulty of getting to it, and crossing the railroad." This was error. The testimony was excluded for the very reasons which made it admissible. The injury to the owner of a farm from the building and operating of a railroad across it, is "not merely by the subtraction of so many feet, or acres, from his estate, valued as if sold for an ordinary purpose, and according to a plan devised for the most profitable use of the whole, but still more by the mode of taking, and its effect on the property which is left, viz., the way in which the railroad cuts the tract or lot, as diagonally, by a curve, or otherwise; the inconvenient shape in which the remaining part is left, the depth of excavations or height of embankments, the obstruction or entire interruption of access to public or private ways, the division of the tract or lot into different parts so that persons or cattle cannot pass from one to the other, or, if at all, only with greater or less difficulty or danger, and the exposure of the owner's property, as buildings, forests, and crops to particular injury from proximity to the railroad." *Pierce on Railroads*, 211.

And there were several other rulings on the evidence, to which, however, we will not take the time to refer particularly, which might have justified the court in setting the verdict aside. In this respect, therefore, we find no error.

But there are many objections made to the second trial, of which we will consider such as seem to be relied on. The first of these is to certain testimony, and the instruction to the jury thereon, relative to certain "cuts and fills" made in grading the roadway. It is contended that these were not a proper element of damage, and should have been excluded. The view of this question taken by the trial judge is thus expressed in the instruction: "In considering the damages other than the value of the land actually taken, the jury can consider the manner in which the land remaining is divided, the cuts and fills damaging the general appearance and utility of the same, if at all, and such other damages as may result from a proper construction and operation of the road."

The evidence showed that for a considerable distance in crossing this farm, there were "cuts" several feet below the natural surface of the ground, from which large and unsightly banks of earth were thrown up, and in other places "fills," which effectually prevented crossing the track except at particular and somewhat inconvenient places. It is not claimed that this grading was unnecessarily or unskillfully done; therefore, whatever its effect in lessening the value of the remaining land may have been, it was covered by the condemnation, and was a proper element of damage for the jury to consider. *Pierce on Railroads, supra. Delaware, etc., R. R. Co. v. Salmon*, 23 Am. Repts., 214. *F. E. & M. V. R. R. Co. v. Whalen*, 11 Neb., 585. In this connection it is claimed that testimony was admitted showing "that large quantities of earth were conveyed outside of the right of way, and placed on the land of Hays." It is true that some such testimony was incidentally given, but under circumstances which made it no just

ground of complaint. It appears that in the examination of a witness respecting the "cuts and fills" this question was put to him: "Take the deepest cut—where was the dirt thrown that came out of it?" This was "objected to as immaterial," etc., but as no ruling appears to have been made on the objection, no question was raised.

The next question in order relates to the assessment of damages—to the time as of which land taken for right of way should be valued in fixing the amount to be paid to the owner. It is an important question, and a new one in this court.

On the part of the plaintiff, it was contended on the trial, and is here, that the assessment should be made as of the time when the proceedings to condemn the property are instituted; in other words, when the petition for the appointment of commissioners to assess the damages is filed with the county judge. The court below, however, held that the jury should make the assessment as of the date of the filing of the commissioners' report, which was something over two months later. There was evidence before the jury tending to show that during this time the market value of the land had materially advanced in consequence of the location of the road. The authorities seem to agree pretty generally that the damages in such cases must be assessed as of the time of taking. *Pierce on Railroads*, 209. Also that the increased value given to property by the location of the road should be excluded in making the estimate. *Id.*, 219, and cases there cited. The point of chief difficulty, however, seems to be found in determining as to just what constitutes a "taking" within the meaning of the law. The decisions on this point are not altogether harmonious, but the better rule and weight of authority seems to be as contended for by the plaintiff, viz., that the definite location of the line of the road, and application for the appointment of commissioners to assess the damages, constitute a taking, and that the rights of parties respect-

ing it are then fixed, and in case of disagreement respecting them, should be judged as of the time when these things were done.

In the case of *Charlestown Branch R. Co. v. County Commissioners*, 7 Met., 78, the question was whether the application for an estimate of damages had been made within three years, as the law required, from the time of *taking* the property. In the opinion of the court, by Wilde, J., it is said that "this depends on the true meaning of the words 'taking the same.' The respondent's counsel contend that the lands were not taken until the company entered thereon, and commenced making their road. On the other hand, it is contended in behalf of the petitioners that the location of their road, and the filing of the same in the office of the county commissioners was a taking within the true meaning of the statute." The holding of the court conformed to the latter view.

In the case of *The Logansport, etc., R. W. Co. v. Buchanan*, 52 Ind., 163, it appears there had been a proceeding to condemn lands for the use of the company's road. On an application, the clerk of the circuit court had appointed appraisers, who had performed their duties, and returned their assessment of damages to him. On the trial of an appeal from the award, the verdict was for an increased amount, and proceedings in error were prosecuted on the ground that the court had permitted several witnesses to testify as to the value of the land at the time of the trial. It was held that the testimony ought to have been confined to the value at the time of filing the application for the appointment of appraisers with the clerk, and the verdict was accordingly set aside. And a like ruling is found in *Lafayette, etc., R. Co. v. Murdock*, 68 Ind., 137, wherein an instruction to the jury that their inquiries as to the amount of damages sustained by the land owner should relate to the time of the appropriation, was upheld. The act of appropriation there being, as before stated, the

application to the clerk of the circuit court for the appointment of appraisers of damages. See also *Graham v. Connersville, etc., Railroad Co.*, 36 Ind., 463 (10 Am. Reports, 56). And precisely the same principle was applied in the case of *South Park Commissioners v. Dunlevy et al.*, 91 Ill., 49, in which it was held that: "On petition to condemn lands for public use, the compensation to be paid must be fixed by the valuation of the property at the date of the filing the petition, and not at the time of trial."

The principle of these decisions, which requires compensation for property taken for public use to be estimated with special reference to its value at the time of the appropriation or taking, is manifestly just to all concerned. By no other rule, in cases of condemnations for uses of great public interest and local benefit, could the valuation of property in the assessment of damages be so successfully guarded against the influence of enhanced values resulting specially from the enterprise. We are of opinion that the several rulings of the court below involving this question were erroneous.

It is claimed finally that the damages awarded by the jury are excessive. In the light of the evidence preserved by the bill of exceptions they seem to be so, but for the reason that a very important item—a plat of the farm and road across it, etc.—illustrative of many of the questions and answers is not before us, we cannot so decide. In such cases a plat may be and frequently is an important and influential part of the evidence, and where one is used a record of the trial is not complete without it. The omission of the plat from this record makes obscure and practically worthless considerable testimony which by its aid may, on the trial, justly have had much weight with the jury. Where all of the evidence used on a trial is not before us we cannot say that the finding was unsupported.

It is true that the certificate to the bill of exceptions is to the effect that it is complete and contains all the evi-

dence produced on the trial. But we find within the bill itself, in the questions and answers especially, incontestable proof that it does not. Where such is the case the certificate will not be taken as conclusive on that point.

REVERSED AND REMANDED.

THE other judges concur.

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MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN
ERROR, v. BENJAMIN F. COON, DEFENDANT IN ERROR.

Witness: OPINION. Without a showing, there is no presumption that a witness is competent to give a reliable estimate of the market value of land; and where one's competency is challenged, before he should be permitted to express an opinion it should be made to appear that he has in some way become qualified to do so.

ERROR to the district court for Richardson county.
Tried below before DAVIDSON, J.

John L. Webster, for plaintiff in error.

J. H. Broady, for defendant in error.

LAKE, CH. J.

Most of the questions in this case were decided and sufficiently commented on in that of this plaintiff against Hays, *ante* p. 223, and it is unnecessary to go over the same ground again in the consideration of this one. The questions thus disposed of relate particularly to the cuts and fills in the grade of the road, etc., as elements of damage, and to the time as of which the assessment of damages must be made, in respect to which the rulings in the two

cases were alike, and as we hold erroneous. But there is one additional question here which requires more particular notice.

It appears that the defendant was examined as a witness on his own behalf. Without showing himself at all qualified to give an opinion on the subject, he was permitted against objection for that reason to testify as to the market value of the land in question, and this, too, without reference to any definite time. The examination in this particular was as follows:

Q. I will ask you the fair market value of your farm at that time?

The question was objected to for the reasons, *first*, that the witness had "not shown himself competent to testify on that subject," *second*, that it did not "fix the proper date at which the value of the land should be estimated." The objection was overruled, and the witness answered, "I considered it worth twenty-five dollars an acre at that time." What particular time was meant by the words "at that time" in this question and answer it is impossible from the record to tell. There were also a like question, objection, ruling and answer, respecting the strip of land taken for the roadway. As several witnesses, whose competency to give opinions was unquestioned, fixed the value at considerably less than this amount, the testimony may properly be said to have been material, and if improperly admitted, to have prejudiced the plaintiff.

Without any showing whatever, there is certainly no presumption that a witness is competent to give a reliable estimate of the market value of land; and where one's competency is challenged, before he should be permitted to express an opinion, it should be made to appear that he has in some way become qualified to do so. *Pierce on Railroads*, 266, *et seq.* *R. V. R. R. Co. v. Arnold*, 13 Neb., 485. This testimony was erroneously admitted.

In this case, as in that of Hays above referred to, the

plat of the farm showing the location of the road over it is omitted from the record. This plat was frequently referred to by the witnesses in giving their testimony, and is absolutely necessary to a correct estimate of considerable of it. Because of the want of it we will not consider the question as to the sufficiency of the evidence to sustain the verdict.

REVERSED AND REMANDED.

THE other judges concur.

15	234
20	374
20	542
15	234
25	212
15	234
30	39
15	234
34	572
15	234
51	202

THE REPUBLICAN VALLEY R. R. COMPANY, PLAINTIFF
IN ERROR, v. ELIZABETH LINN, DEFENDANT IN ERROR.

- Practice: CROSS APPEALS.** Where each party appealed to the district court from the assessment of damages by the commissioners appointed to assess the damages occasioned by the taking of the right of way over the lands of plaintiff for the railroad of defendant, *Held*, That a motion by defendant to dismiss the plaintiff's appeal for the want of notice of such appeal was rightfully denied.
- Eminent Domain: RAILROAD: EVIDENCE.** On the trial of a right of way case a witness may state that the taking of a right of way across plaintiff's farm in a diagonal direction from the n. e. corner to the s. w. corner is a damage to the remaining and severed pieces of land, and may state in what such damage consists.
- Cross-examining Witness.** A party who on cross-examination of a witness asks him an immaterial question is concluded by his answer and cannot call another witness to impeach him.
- The Instructions** copied at length in the opinion, *Held*, To present the case fairly to the jury.

ERROR to the district court for Pawnee county, where the cause had been brought on appeal from the county court on an award of damages for right of way of the railroad of

a tract of land belonging to Linn. Tried below before
WEAVER, J.

T. M. Marquett and *J. W. Deweese*, for plaintiff in error. Plaintiff was entitled to notice of appeal. *Neb. Railway v. Van Deusen*, 6 Neb., 160. On proof of damages, cited: *Evansville R. R. v. Fitzpatrick*, 10 Ind., 120. *Farrand v. C. R. R.*, 21 Wis., 435. *Harrison v. Iowa R. R.*, 36 Ia., 323. *Alabama R. R. v. Burkett*, 42 Ala., 83. *F. E. & M. V. R. R. v. Whalen*, 11 Neb., 587. *City of Parsons v. Lindsay*, 26 Kan., 430.

George M. Humphrey, for defendant in error, on notice of appeal, cited: *Wade*, 482, 513. On jurisdiction, *Porter v. Railroad*, 1 Neb., 15. *Crowell v. Galloway*, 3 Id., 220. On evidence, *F. E. & M. V. R. R. v. Whalen*, 11 Neb., 587. Mills on Eminent Domain, p. 168. *Snow v. Boston R. R.*, 65 Me., 230. *Dwight v. Hampden*, 11 Cush., 201. *Simmons v. St. Paul R. R.*, 18 Minn., 184. *Swan v. Middlesex*, 101 Mass., 173. On instruction, Mills Eminent Domain, 162.

COBB, J.

In this case there are numerous errors assigned in the motion for a new trial and the petition in error which are not noticed in the brief of plaintiff in error. Those noticed in the brief only will be considered in this opinion.

The first point made is, "that the court against the objections of plaintiff in error assumed and entertained jurisdiction in the case on the pretended appeal by defendant in error from the award of the commissioners."

It appears from the record that the plaintiff in error made a special appearance in the court below and filed a motion to dismiss the appeal in said cause for the reason that no notice of appeal to said court had been served on it. But it does not appear that the attention of the court

was ever called to said motion or any order made thereon, so of course no exception to any ruling of the court thereon is presented for the consideration of this court. But the record brought here by plaintiff in error does show that an appeal was taken to the district court from the award of the commissioners by both parties, and that in said court by consent of parties the two causes thus presented by said two appeals, to-wit, docket numbers 504 and 505, were consolidated. So that it was as much the appeal of plaintiff as of defendant in error that was tried, and whatever may be the law in regard to notice in such cases such objection cannot be considered here.

The second point made is upon the question of the proof of damages; and it is claimed that the witnesses were allowed to fix the amount of damages defendant in error was entitled to recover instead of leaving that duty to the jury after they were made acquainted with the facts. I do not understand the testimony to be open to the above objection. The following testimony is that which I understand to be particularly objected to under this head, the witness S. L. Linn being upon his examination in chief:

41 Q. State the value of that land per acre at or just before it was appropriated for the right of way?

Defendant objects as incompetent. Overruled and exception noted.

A. Just about the time that line was run through we were offered thirty dollars an acre.

Defendant objects, and move to strike out. Sustained.

42 Q. What was a fair market value?

A. I think it was more than that.

43 Q. After it was appropriated as a right of way what do you think that farm was worth?

Defendant objects as incompetent. Objection sustained. Plaintiff excepts.

* * * * *

45 Q. At that time what was the value of the land, at the time it was taken?

Objected to as incompetent. Objection overruled. Defendant excepts.

A. You mean just what they took?

46 Q. Just what they took first.

A. Well, it was not worth any more than the rest only the way they took it.

47 Q. By the court. How much an acre?

A. Fifty dollars an acre.

48 Q. By Mr. Humphrey. How much less is that farm worth by reason of their taking that right of way through it?

Defendant objects as incompetent. Question withdrawn.

This witness was cross-examined by the counsel for the plaintiff in error, and finally as follows:

84 Q. I understand you to say you had been offered thirty dollars an acre for your farm?

A. Just about the time the line was surveyed; I think about the first of January.

85 Q. That included the buildings and improvements and everything?

A. It included everything there.

86 Q. How is it you say that the strip of right of way, which don't interfere with the buildings, except causing the moving of the barn, how can you say that was worth fifty dollars an acre?

A. I mean taking it out of the middle of the field. I am including the damage with the value of the land. That is, I mean it was worth that to take it out of the middle of the field.

87 Q. If the strip had been taken out of one side you would not have put it so high?

A. Oh, no.

Re-direct examination by Mr. Humphrey.

88 Q. Do you mean to say that the fifty dollars is all the damage to the property?

A. Oh, no, I don't claim that.

Defendant objects as incompetent. Overruled and exception.

89 Q. Explain what you mean?

A. If a man wanted to buy that much out of the middle of the farm fifty dollars an acre would not buy it; I don't mean to say it was all the damage.

In the case of *R. R. v. Whalen*, 11 Neb., 587, this court, in the opinion by the chief justice, say: "It is doubtless a proper course to take the opinion of experts as to the value before it is affected by the location of the road. This done, the testimony on the question of damages should be confined to those matters affecting the value proper to be considered, leaving the jury to draw their own inferences therefrom unaffected by the judgment of others."

I fail to see wherein the rule thus laid down has been violated in the case at bar. Numerous authorities are cited to the proposition that in an action of this kind a witness should not be allowed to give his opinion of the amount of damage to plaintiff's farm caused by the taking of the right of way for defendant's railroad. But I know of no authority which goes the length of holding that a witness may not state that such taking is a damage to such farm or that he may not point out the various matters in respect to which such damage may result.

After the testimony on the part of the defendant in error was closed, the plaintiff in error called witnesses on its behalf, among others J. P. Love. I transcribe a part of his testimony:

242 Q. Were you one of the commissioners that viewed this land?

A. Yes, sir.

* * * * *

246 Q. Were you there in a wagon with the other commissioners who viewed the land?

A. Yes. I was one of the commissioners.

247 Q. You may state whether Linn was there?

A. Mr. Linn, the gentleman on the stand, was there.

248 Q. He is the son of the plaintiff, Mrs. Linn?

A. I believe so.

248 Q. You may state, in your estimate, the injury to the place.

Objected to as immaterial. Sustained and exception.

250 Q. You may state whether you observed how the road cut the farm?

A. Yes, sir.

251 Q. I will ask you to state whether Linn presented to you or represented to you the fruit, hedge, and fencing, trees, orchard, etc., that had been destroyed by the location of the railroad?

Plaintiff objects as immaterial. Objection sustained and exception.

L. A. Stebbins, a witness for plaintiff in error, testified that he was also one of the commissioners who assessed the damages to the farm. His examination proceeds as follows:

268 Q. The plaintiff's son was there at the time you were viewing it?

A. I suppose it was her son.

269 Q. He lived there on the premises, did he?

A. I could not swear he did, but suppose he did.

270 Q. He talked with you about the matter, did he?

A. Yes.

271 Q. And he represented what had been destroyed by the grading of the railroad?

Objected to. Objection sustained and exception.

After the defendant below had closed its testimony the plaintiff recalled the witness S. L. Linn, and re-examined him. Whereupon on cross-examination by counsel for defendant below he testified as follows:

297 Q. State to the jury whether you did not represent to the commissioners who appraised the damages this last time, that the grape-vines destroyed by right-of-way were worth one dollar apiece?

A. No, sir. I never made such a statement to those commissioners or anyone else.

298 Q. You did not state the number of grape-vines, and value at one dollar apiece?

A. I stated the number of grape-vines, but not the value.

299 Q. You say you did not give them any value on the grape-vines?

A. I did not.

The witness L. A. Stebbins was then recalled and examined by counsel for plaintiff in error, as follows:

300 Q. State to the jury what value Linn—S. L. Linn—put on the grape-vines destroyed by the right-of-way, if any, at the time of the appraisalment of damages by you as one of the commissioners at the last appraisalment.

Plaintiff objects, the ground has not been laid for impeaching the witness Linn. Objection sustained, defendant excepts.

301 Q. You may state whether on October 4, the date of the appraisalment of damages, Mr. S. L. Linn was present, and had represented to you the value of the grape-vines destroyed by the right-of-way or not?

Plaintiff objects as irrelevant and incompetent. Objections sustained and exceptions.

Now although the witness S. L. Linn had been on the stand three times on this trial, and each time examined and cross-examined, he had not been interrogated as to the value of the grape-vines, and had expressed no opinion as to their value. It could not have been sought therefore to contradict him by the testimony of Stebbins. If it was, then such testimony was inadmissible for the reason that it being quite immaterial to any issue in the case whether the witness Linn had at one time stated the value of the grape-vines at one dollar apiece or not; the plaintiff in error by asking him the question, was bound by his answer, and could not call another witness to contend him.

I say that the question propounded to the witness was immaterial. It was not material to contradict any opinion which he gave on the stand as to the value of the grape-vines, for he gave none. Certainly not for the purpose of estopping the plaintiff below from claiming the price she did for the vines, for while the witness is her son, and was then a member of her family, there is no attempt made to prove that he was her agent, or had ever acted for her in this or any other business.

Plaintiff in error complains of but one of the instructions given by the court to the jury, to-wit:

"11. In securing the owner of the land just compensation for taking a right-of-way through the same, the jury should give, in addition to the actual value of the land taken, a further indemnity for damages resulting from the use to which the land taken is to be applied, that is if the balance of the tract is damaged."

Plaintiff in its brief says, "Now in this use stock are killed, human lives are endangered and lost, and property destroyed by fire. Annoyances are caused by smoke, noise, and confusion. All of these might be considered under this instruction, and probably were. And yet none of the facts should be considered by the jury."

I do not think the language of the instruction is open to the construction thus placed upon it; but it seems that the court, to avoid any possibility of the jury placing such a construction upon it, also instructed them as follows at the request of the defendant:

"1. The jury are instructed that in estimating the damages due the plaintiff for right-of-way appropriated by the railroad company you will not allow anything for the noise and confusion incident to the operation of trains, nor any damages that may arise by reason of the negligent or improper construction or management of the road.

"2. The jury will not allow any damages that arise or may arise from fires set out by the engines on the road,

nor for the danger to stock and children or persons, or the damages that may arise by injury to stock, property, or persons.

"4. The plaintiff being the owner of lands on both sides of the track, is entitled upon proper application to have a good and sufficient road-way crossing. Whether such crossing has or has not been made is not to be considered by you in this case, and no damages can be allowed by you for the want of a crossing or for its insufficiency. That is a question that cannot be determined in the award of damages for right-of-way as in the present case."

Taking these instructions altogether they are quite as favorable to the plaintiff in error as the law and the evidence in the case would admit of. Nor do I think the verdict of the jury shows that they either misconstrued the instructions of the court or failed in the proper application of the evidence.

The judgment of the district court should be affirmed.
By the Court,

JUDGMENT AFFIRMED.

THE STATE OF NEBRASKA, ON THE RELATION OF HARRY
WHITE, v. A. G. KENDALL, COMMISSIONER OF PUBLIC
LANDS AND BUILDINGS.

1. **Educational Lands and Funds:** RULES OF BOARD. The board of educational lands and funds have the power within constitutional and statutory limits to establish reasonable rules for its government in the transaction of its business.
2. ———: ———. The rule of said board adopted by the following resolution: "*Resolved*, That all surrenders of sale or leases of school lands shall be held thirty days before lease will be issued on the same, and the county treasurer notified of said surrender and that applications will be received to lease the same," is not inimical to the provisions of either the constitution or the statute.

ORIGINAL application for mandamus.

P. Likes and A. J. Rittenhouse, for the relator.

Isaac Powers, Jr., Attorney General, for the respondent.

COBB, J.

This case arises upon an application by the relator to this court for a writ of *mandamus* against A. G. Kendall, commissioner of public lands and buildings, commanding him to issue a lease to the relator of certain tracts of school land therein described, being the trust property of the state. The case was submitted to the court upon the application, answer, and a certain stipulation of facts filed with the papers in the case.

It appears that the two tracts of school lands in question, were on the 9th day of March, 1880, leased to one R. H. Pead; that on the 17th day of June, 1882, the lease for one of the said tracts was by the said Pead surrendered to the state; that on the 19th day of the same month the other of the said leases was also surrendered to the state; that the treasurer of Hamilton county, in which county the said school lands are situated, was thereupon informed of the surrender of the said leases, and that, under the rules and regulations adopted by the board of educational lands and funds, the said lands would be subject to lease at the expiration of thirty days after such surrender by said Pead, and the said board made the following order, to-wit: "In the matter of leasing educational lands, the board proceeded to open bids for leasing educational lands. On motion, the bids for leasing were referred to Commissioner A. G. Kendall, and where subject to lease, to lease to the highest bidder." This was done at the regular meeting of said board, on the 11th day of July, 1882, and before the expiration of thirty days after the surrender of either of the said leases;

that the bids then on file and referred to the said commissioner under said order, amounted to several hundred in number, and that by mistake and inadvertence the proposal of said relator for the said lands was marked accepted, and a lease was executed by the said commissioner and forwarded to the treasurer of Hamilton county to be delivered to the said relator; that before said lease was delivered to said relator, on the 17th day of July, 1882, it was discovered that said lease had been executed and forwarded by mistake, and thereupon the said commissioner wrote to the said county treasurer informing him of such mistake, and directing him to return the said lease to said commissioner, which was done, and said lease was returned to said commissioner and never delivered to or executed by the said relator.

It further appears, that at the time of said meeting of said board on the 11th day of July, 1882, and the time of the executing and forwarding of the said lease as aforesaid, the relator was the highest bidder therefor, his said bid being twenty and one-fourth per cent of the appraised value of said land; but that afterwards, and on the 7th day of August, 1882, after the said commissioner had recalled and cancelled the said lease as having been executed and forwarded by mistake, and with full knowledge of all the facts, the relator filed in the office of the said commissioner another bid and proposal, wherein and whereby he proposed to lease the said lands and pay therefor, for the south-east quarter of section sixteen in township eleven north, of range 7 w., twenty-eight and one-third per cent of the appraised value thereof, and for the east half of the south-west quarter, and the south-west quarter of the south-west quarter of the same section, township, and range, thirty and three-fourths per cent of the appraised value thereof; but that on and before the next meeting of said board, on the 8th day of August, 1882, there was presented to and filed with said board of educational lands and funds a bid and

proposal for all of said lands, and to pay for a lease thereof seventy-five per cent of the appraised value thereof. So that at the meeting of said board at which the said lands were actually leased, the relator was not the highest bidder therefor.

On the 11th day of March, 1879, the board of educational lands and funds, at a regular meeting thereof, adopted the following resolution, which remains in force, to-wit: "*Resolved*, That all surrenders of sale or leases of school lands shall be held thirty days before leases will be issued on the same."

This case turns upon the question whether the said board had the power to adopt this resolution for their government under the law, and whether the same is valid and binding upon the public. This board is created by the constitution. Its duties are of a highly important character. That it has the right, or that it is its duty to adopt rules and regulations for the uniform government of its business, and the lands and funds under its control, no one will deny; or that it has the right to infringe upon the provisions of the constitution, or the laws enacted in pursuance thereof, no one will claim.

The provision of statute in force, bearing on the subject, is as follows:

"Sec. 17. Whenever any of the lands herein provided for have been offered for sale, and not sold for want of bidders, the said board may lease the same on the following conditions: All persons desiring to lease such lands shall file their sealed proposals for the leasing of the same, under the terms and conditions hereinafter set forth in the office of the county treasurer of the county in which such lands are situated. The proposal shall describe the land desired to be leased, by section, township, and range, and set forth the highest rate per cent on the appraised value of the land which the bidder will pay. *Provided*, That no bid or proposal offering less than six per cent per annum on the

appraised value of such land shall be entertained; and such proposals shall be transmitted by the treasurer to the commissioner of public lands and buildings, and by him opened at the next meeting of the board, who shall examine and approve or reject the same, and if approved, execute a lease for the same to such bidder at the price named in such proposal. *Provided*, If any other bid for the same land shall be presented to said board, they shall execute the lease to the highest bidder," etc.

These provisions are applicable to the first leasing of school lands, and are dependent upon such lands having first been offered for sale, and not sold for want of bidders. They do not directly, if at all, apply to lands that have been leased, and such lease surrendered or forfeited. There is no provision in the statute expressly authorizing the board to accept the surrender of a lease and execute a second lease of the same lands to the same or a different lessee. If they possess such power, it grows out of their general powers granted by the provisions of the constitution, and the first section of the chapter of the statute under consideration, and its exercise is neither limited nor qualified by the terms of the section above quoted, further than such limitations and qualifications may be necessary to an intelligent, fair, and equitable administration of the trust reposed in said board.

The very nature of the duties required of said board by the constitution and the law, requires that they should establish standing rules for their government, in the dispatch and transaction of business. Resolution is an appropriate method for the establishing of such rules. The spirit and intent of the law is, that these trust lands, after being offered for sale, and not sold for the want of bidders, should upon fair competition be leased to the highest bidder. I think the rule above quoted is well calculated to ensure this result, and that it is neither inimical to the provisions of the constitution or of the statute.

The peremptory writ of mandamus must be denied. By the Court,

WRIT DENIED.

THE STATE OF NEBRASKA, ON THE RELATION OF NEAL
WALTERS, v. HENRY OLESON, RESPONDENT.

Removal from Office. The trial and ousting from office of a sheriff, for corruption, under paragraph 5 of sec. 1, art. II., chap. 18, Compiled Statutes, by the board of county commissioners, is not the exercise of judicial power, nor of the power of impeachment; but of a quasi political and administrative power, not denied to such bodies by the constitution.

ORIGINAL action in the nature of *quo warranto*.

Wilber F. Bryant and Fred J. Fox, for relator, cited: *Attorney General v. McDonald*, 3 Wis., 703. *Gough v. Dorsey*, 27 Wis., 131. *Smith et al. v. Odell*, 1 Pinney, 451. *Gilbert v. Priest*, 60 Barb. (N. Y.), 448. *Collanan v. Judd et al.*, 23 Wis., 343. *In re Sherman M. Booth*, 3 Wis., 81.

R. E. W. Spargur, for respondent, cited: *Hamlin v. Meadville*, 6 Neb., 223. *State v. Buffalo County*, 6 Neb., 460. *Doody v. Vaughn*, 7 Neb., 31. *South Platte Land Co. v. Buffalo Co.*, 7 Neb., 258. 44 Pa. St., 332. *Cooley Const. Lim.*, 276. 37 N. Y., 518. 13 Mich., 481. 6 Kan., 430. *Dill. Mun. Corp.* (3d ed.), §§ 240 and 267 and cases cited. 2 Kent Com., 297. *Bouv. Law Dict.*, 157 and cases cited.

COBB, J.

This is a suit in the nature of an application for a writ of *quo warranto* by Neal Walters, who claims to be enti-

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18	428
15	247
26	262
15	247
33	709
33	805
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37	150
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45	330
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46	738
15	247
61	348

tled to the office of sheriff of Knox county, against Henry Oleson, the actual incumbent of said office.

It appears from the record that the relator was duly elected to said office at the general election of 1881, and entered upon the duties of said office and continued to discharge them until on or about the twenty-ninth day of December, 1882, when a complaint was made before the board of county commissioners of Knox county charging the said relator with official misdemeanors in his said office of sheriff of Knox county; that upon a trial of the said charge the said relator was found guilty by said board, and a judgment rendered by said board removing and ousting him from the said office.

Section 1 of article II. of chap. 17 of the Comp. Statutes, provides as follows:

"Sec. 1. All county officers, including justices of the peace, may be charged, tried, and removed from office for official misdemeanors in the manner and for the causes following: *First*, For habitual or willful neglect of duty. *Second*, For gross partiality. *Third*, For oppression. *Fourth*, For extortion. *Fifth*, For corruption. *Sixth*, For willful mal-administration in office. *Seventh*, For conviction of a felony. *Eighth*, For habitual drunkenness."

"Sec. 2. Any person may make such charge, and the board of commissioners shall have exclusive original jurisdiction thereof by a summons."

It was under these provisions and for the fifth cause as therein numbered that the relator was charged, tried, and removed from office. He urges now that the above provisions are in conflict with the provisions of sec. 1 of article VI. of the constitution of the state, which provides as follows:

"Sec. 1. The judicial power of this state shall be vested in a supreme court, district courts, county courts, justices of the peace, police magistrates, and in such other courts

inferior to the district courts as may be created by law for cities and incorporated towns."

It cannot be denied, I think, that under the English system impeachment, or more properly speaking the trial of an impeached person, is an exercise of judicial power. "In that kingdom," says Story (Story on the Constitution, 790), all the King's subjects, whether peers or commoners, are impeachable in parliament; though it is asserted that commoners cannot now be impeached for capital offenses, but for misdemeanors only," etc. But in this country impeachment has always been confined to civil office holders, and while in one sense it is as much a judicial inquiry to to try a man for accepting a bribe, where the penalty upon conviction is only that of deprivation from holding an office, as though it were his incarceration in the penitentiary, yet there is a sense in which the object of such inquiry would in the latter case be conceded to be judicial, while in the former it well might be designated as administrative or political. -

The constitution of the United States provides—art. III., sec. 1: "The judicial power of the United States shall be vested in one supreme court and in such inferior courts as the congress may from time to time ordain and establish." Yet section 3 of art. I. of the same instrument provides that: "The senate shall have the sole power to try all impeachments." Now then it must be that the framers of that instrument understood the trying of an impeachment as something else than the exercise of judicial power. The same may be said of the framers of the constitutions of nearly every state of the union, as in nearly every case they have lodged the judicial power in one department of the state government, but imposed the duty of trying impeachments upon another and different one. Our own state, however, furnishes an exception to this general rule. Here, while the two houses of the legislature in joint convention possess the sole power of impeachment, that is of presenting

articles of impeachment, yet the trial must take place before a court composed of members of the judicial department. Whatever may have been the intention or understanding of the framers of our constitution in that respect, I think that by the provision now under consideration they imposed upon the judges a duty not judicial, and which might properly have been left here, as elsewhere within our common country, with one of the legislative bodies.

The provision of the constitution of the State of Illinois, vesting the judicial power in the courts, is substantially the same as that of our own constitution, above quoted. Under it the case of *Donahue v. County of Will* (100 Ills., 94), came before the supreme court of that state. In that case a county treasurer was charged and tried before the board of county supervisors for gross misconduct in office, found guilty, and removed from office. The case was taken to the circuit court on *certiorari*, where the action of the board of county supervisors was affirmed; whereupon the cause was taken to the supreme court on error. In that case as in the one at bar, the sole question was: Had the county board legal authority and constitutional power to hear and determine, and remove the relator from office? The provisions of the Illinois statute on the subject were substantially the same as those of our own; so that the question there as here was one of constitutional power, whether the courts of law under the one section of the statute, or the court of impeachment under the other, had not the exclusive jurisdiction of cases of this kind. The opinion of the court by Mr. Justice Walker is quite exhaustive, citing cases from the courts of last resort of New York, Wisconsin, Michigan, Texas and Massachusetts, and many older Illinois cases, and reaching a conclusion sustaining the action of the county board. I think upon a careful consideration of the whole subject, that it is safe to follow this precedent, though that the case is entirely free from doubt cannot be said.

The writ of quo warranto must be denied. By the Court,

WRIT DENIED.

THE BURLINGTON AND MISSOURI RIVER RAILROAD
COMPANY IN NEBRASKA, PLAINTIFF AND APPEL-
LEE, v. THE BOARD OF COUNTY COMMISSIONERS OF
LANCASTER COUNTY ET AL., DEFENDANTS AND AP-
PELLANTS.

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15	255
15	251
26	668

1. **Railroads: TAXES.** It being the duty of the state auditor under the provisions of section 39 of chapter 77, compiled statutes, in case of any railroad company in this state whose property is situated in more than one county, failing to list its property to him for taxation, as therein provided, by the third day of March of each year, to proceed to obtain the facts and information necessary to such taxation, in any manner that may appear most likely to secure the same correctly, it will be presumed in the absence of proof, that the property of such company lawfully taxable by the state board of equalization, was for the year or years in question properly taxed by the said state board.
2. ———: ———. The property of a railroad company which should properly be assessed by the state board of equalization, is not rendered assessable by the precinct assessor, nor taxable by the county board, by reason of the failure of the officers of the railroad company to list the same to the state auditor, or of the state board of equalization to assess the same.
3. ———: **DEPOT AND DEPOT GROUNDS** of a railroad actually used by the company in the operation of such railroad, or kept for the use thereof in the transaction of such increased business as may be reasonably anticipated in the near future, is taxable only as adding value to the mileage of the main line and side track of such railroad, under the provisions of chapter 77, compiled statutes, entitled Revenue.

APPEAL from a decree rendered in the district court of Lancaster county, by POUND, J., enjoining the collection of

tax as levied by said defendants on the "depot grounds" of plaintiff.

Mason & Whedon, for appellants.

Marquett, Deweese & Hall, for appellee.

COBB, J.

The questions presented by this appeal were in substance presented, considered, and decided in the case between the same parties reported in 7 Neb., 33. The levy for taxes of the year 1874 were involved in that case. Those for the taxes of 1875, 1877, and 1878, on the same property, are involved in this. This ground consisted of an oblong piece of land 700 by 1,500 feet in extent, through which the main line of plaintiff's railroad runs, and which it claims to own and hold as depot grounds. The case turns on the question whether upon the facts as stated in the pleadings and proved upon the trial, these depot grounds were, under the law as it stood at that time, assessable by the local assessor or by the state board of equalization. Some stress is laid in one of the briefs of appellants on the fact that there is no evidence in the case that this land was, in point of fact, assessed by the state board of equalization for the taxes of the years in question. Under the law it was the duty of the appellee to list for assessment and taxation, to the state auditor, "all of the following described property belonging to such corporation within the state, viz.: road-bed, superstructure, right of way, rolling stock, side track, telegraph lines, furniture and fixtures, and personal property belonging to such corporation. Such list shall contain: *First*, The number of miles of such railroad or telegraph line in the state of Nebraska, and the number of miles of the same in each organized county therein. *Second*, And such return shall be made to the auditor of state on or before the first day of March

annually. If the return aforesaid is not received by said auditor by the third day of March * * * he shall thereupon proceed to obtain the facts and information aforesaid in any manner that may appear most likely to secure the same correctly," etc. Gen. Stat., 901.

While there might be a view taken of the case in which it might be held necessary for the plaintiff to show, as well in its pleading as by its proof, that it has complied with the law in respect to listing its property to the state auditor before applying to a court of equity for relief against local assessment and taxation, yet, as a question of law, if the land in question was listable to the state auditor and assessable by the state board of equalization, then it was not assessable by the precinct assessor nor taxable by the county board, whether it was, in point of fact, listed to the auditor or assessed by the state board or not. Indeed it is extremely doubtful from the wording of that part of the section of the statute above quoted whether the list therein spoken of should contain anything more than the number of miles of such railroad, including side track and switches in case of railroads, and of main and side wire in the case of telegraph lines, in the state of Nebraska, and the number of miles of the same in each organized county therein. If it were necessary to state in such list the number and size of depot buildings, the size of depot grounds, the amount and kinds of every species of personal property, etc., the only purpose such listing would serve would be to enable the state board of equalization to assess the entire road per mile, and not to enable it in point of fact to tax these specific buildings, grounds, or personal property. There is a general presumption that public officers discharge their public duties, and this presumption prevails in all cases except where the proper discharge of such duties is directly called in question. If the state auditor did do his duty under the provisions of the statute, then, even if the plaintiff's officers failed to list this property according

to law, he availed himself of the other means provided for by statute and obtained the necessary data to enable the state board of equalization to assess the mileage of the railroad, including side tracks, at its fair taxable value, assigning the proper number of miles to each organized county of the state through which the road runs, and that is all that could be done in any event.

The issue to which all or nearly all of the testimony on either side seems to have been directed is, whether the block of ground as assessed by the precinct assessors was necessary for the use and running of the railroad, and whether it was in point of fact used by the said railroad company exclusively in its business, as contemplated by its charter. There was considerable and somewhat conflicting testimony as to the number, size, and use of the buildings situated on said ground, the number and situation of the side tracks upon the same. The district court in its decree must have passed upon these questions, and as has been often held by this as well as other courts, the findings of matter of fact by a trial court where there is conflicting testimony, except there be an overwhelming preponderance against such finding, will not be disturbed. In the case between the same parties in this court, above referred to, the court in the opinion say: "There is no restriction upon the authority of the company to purchase with the consent of the owner all the real estate they may require for side tracks and depot grounds. In the case at bar (says the opinion) the present and prospective business of the company would seem to justify them in the purchase of the lands in controversy for side tracks and depot grounds." So in the case now under consideration, as well from the testimony in the case as from that field of observation to which this court cannot close its eyes, it is apparent that the commercial necessities of a through line of railway at this central point are yet in their infancy, and that such appliances, room, and accessories as might be sufficient for

the accommodation of such business eight years ago would be greatly insufficient ten years hence, and it seems quite clear to me that a corporation that would neglect to provide larger business facilities than barely sufficient for the needs of to-day would fail in its duty as well to the public as to its own stockholders.

There was some evidence that in one of the years for which the said ground was assessed a small building thereon was occupied by an employee of plaintiff railroad company as a residence, for a period of four months at a rental of seven dollars per month. But it is quite apparent that such disposition of the property was and was intended to be quite temporary, and the amount received in services for the rent of this building bears but a slight relation to the amount of taxes assessed against this property. In consideration of the magnitude of the interest involved in the case this matter of the rental of the said building may well be said to fall within the maxim *de minimis non curat lex*.

We find no error in the record, and the decree of the district court must be affirmed. By the court,

JUDGMENT AFFIRMED.

THE case of the *B. & M. R. R. v. The City of Lincoln* involves the same questions passed on in the foregoing, and is likewise affirmed.

Marquett, Deweese & Hall, for the railroad.

A. C. Ricketts, for the city.

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16	14
17	494
15	256
27	648
15	256
45	387

**MILF. KELLOGG AND OTHERS, PLAINTIFFS, V. LUKE
LAVENDER AND OTHERS, DEFENDANTS.**

Interest. In an action for specific performance of a contract to convey certain real property, the purchase price was twenty-five hundred dollars, five hundred dollars of which was paid down, and time notes given for two thousand dollars, payable in one and two years from date with interest at the rate of twelve per cent per annum. These notes were endorsed by the vendor, for value, before maturity, and the property conveyed to a third party with notice. *Held*, That the holders of said notes were entitled to interest thereon at the rate therein provided for, after as well as before maturity.

APPEAL and cross-appeal from the district court of Lancaster county, POUND, J., presiding. The facts sufficient to an understanding of the case are fully stated in the opinion.

Brown & Ryan Brothers, for appellant Tingley, cited: *Monnett v. Sturges*, 25 Ohio St., 384. *Pruyn v. Milwaukee*, 1 Wis., 386. *Thompson v. Pickel*, 20 Iowa, 490. *Warner v. Juif*, 38 Mich., 622. *Brewster v. Wakefield*, 1 Minn., 352. *Union Ins'n v. Boston*, 129 Mass., 82. *Corcoran v. Doll*, 32 Cal., 82. *Beckwith v. Trustees, etc.*, 29 Conn., 286. *McLane v. Abrams*, 2 Nevada, 199. *Van Beuren v. Van Gaasbeck*, 4 Cowen, 496. *Cecil v. Hicks*, 29 Gratt (Va.), 1. *Sharpe v. Lee*, 14 South Carolina, 341. *Lester v. Bank of Mobile*, 7 Ala., 490. *Cromwell v. Co. of Sac.*, 96 U. S., 61. *Sutherland on Damages*, vol. 1, p. 550, and cases cited. *Hand v. Armstrong*, 18 Iowa, 324. *Lee v. Davis*, 1 A. K. Marsh (Ky.), 397.

J. S. Gregory, for cross-appellant.

COBB, J.

This cause was before this court on appeal from the district court of Lancaster county at the July term, 1879, and

was remanded to said court for the purpose of bringing in as parties thereto the persons named in the opinion of the court in 9 Neb., 418.

It appears from the record that after the necessary amendments of pleadings to bring in the designated parties, as well as others who seem to be proper parties, and the settling of the pleadings between the several parties, new and old, the cause was finally tried to a referee, and a final decree entered.

From this decree an appeal was entered by defendants R. R. Tingley and J. W. Hartley, and a cross-appeal by the defendants, J. E. Philpott, Thomas J. Cantlon, E. Mary Gregory, Luke Lavender, and John S. Gregory, and the plaintiff, Milo F. Kellogg.

I will dispose of the questions raised by the cross-appeal first. Of these there are several, but two of which will be noticed here. The others having been settled in the case when previously before the court, will not be re-opened.

1. It appears that on the 28th day of November, 1879, after this cause had been remanded to the district court, and was pending therein, the plaintiff, Milo F. Kellogg, for the consideration of one hundred dollars, executed and delivered to the defendant, E. Mary Gregory, an assignment of the original agreement of purchase of the premises herein involved between himself and the defendant, Luke Lavender; and he also executed and delivered to the said E. Mary Gregory a power of attorney authorizing and empowering her to "either prosecute or dismiss any such suit in said state of Nebraska, which may now be pending or which may grow out of, or arise out of said contract," etc. It also appears that on the 20th day of February, 1880, in vacation of said court, the said E. Mary Gregory, by virtue of, and under the said power of attorney, entered upon the appearance docket of said court a general dismissal of said cause, without prejudice. It also appears that before such order of dismissal was entered, and on the 22d day of

November, 1879, the cross-petition of the defendant, Joseph W. Hartley, setting up and claiming his interest and rights in the premises as afterwards found by the referee, had been duly filed in court. It further appears that on the 20th day of February, 1880, the same day upon which the said order of dismissal was made, a motion was made, presented, and filed by counsel for an order vacating the same for the several causes therein specified, which said motion was afterwards, at the February term of said court, allowed, and the said order of dismissal vacated.

2. It appears that one of the notes given by Kellogg to Lavender, was by him negotiated to Tingley, who was at that time engaged in making loans, purchasing notes, and making investments of money for Parshall. Tingley charged this note up to Parshall, and claimed to hold it on his account; but this, Parshall repudiated, and by litigation compelled Tingley to otherwise account for all funds held for him, or on his account. Thereupon, Tingley applied to the district court in this case, and obtained leave to answer as a defendant herein, and answered as an intervenor, claiming all rights and benefits in and to the said one thousand dollars and interest as secured and represented by the said note as would otherwise be awarded and decreed to the said Parshall. It further appears that in the month of February, 1880, the defendant, John S. Gregory, obtained a stipulation from the said Parshall (which was duly filed in the case in the district court, July 24, 1882), for the dismissal of the said cause.

The cross-appellants claim upon the above facts that upon the assignment by Kellogg to E. Mary Gregory of the Lavender contract, and giving her the power of attorney above referred to, and the entry by her of the order of dismissal, the cause was absolutely taken out of court as to all parties; and that even if this were not so to all intents, that the right and power of W. J. Lamb to use the name of said plaintiff in any future proceedings in the case

Kellogg v. Lavender.

thereby ceased and terminated. Also that upon the filing of the stipulation of the said Parshall in the district court in said cause for the dismissal thereof, the power of the court to grant relief to Tingley ceased and terminated.

The above is my solution of the several pleadings, motions, papers, and brief of the said cross appellants, which, from their number, it would be tedious to name specifically. In an equity suit, a superior court of original jurisdiction is invested with a wide discretion as to the bringing in of new parties and the retention of old ones, when such importation or retention is proposed in apparent good faith, and seems to be for the furtherance of justice, the saving of costs, or the termination of litigation; and in a court of appellate jurisdiction, I know of but one general rule for the review of such action of the trial court—providing of course that the provisions of no statute have been violated—has such proceeding been such as was calculated to elicit the truth, ensure a fair trial, and do justice between the parties? Tested by this rule, I see nothing in the proceedings of the district court which ought to be reversed or criticised here.

The appeal of the defendants, R. R. Tingley and J. W. Hartley, is upon the amounts severally decreed to them to be paid by the defendant, E. Mary Gregory, or out of the proceeds of a sale of said real estate; and the sole question raised by said appeal is as to the rate of interest which the notes given by Kellogg to Lavender bear after maturity. The following is a copy of one of the notes, the others being in the same form:

“\$1,000.00. LINCOLN, NEBRASKA, July 13, 1872.

“On or before the first of May, 1874, I promise to pay to the order of Luke Lavender one thousand dollars at 12 per cent interest from date, value received.

“MILO F. KELLOGG.”

Endorsed by Lavender.

The referee found that the notes drew interest at twelve

per cent from date until maturity, and seven per cent after maturity. The district court modified the finding of the referee in that respect, and in its decree allowed interest on the notes from date to maturity at twelve per cent; from maturity, May 1, 1874, to June 1, 1879 (the date of the taking effect of the statute changing the rate of interest), at ten per cent, and from the last mentioned date at seven per cent. The appellants claim interest at twelve per cent after as well as before maturity.

The question thus presented is an important one which has not previously been before this court. It has, however, been before the courts of last resort of several of the states, and the supreme court of the United States. It first came before the latter court on appeal from the supreme court of Minnesota Territory, in the case of *Brewster v. Wakefield*, 22 How., 118. The laws of Minnesota Territory placed no limit upon the rate of interest for which parties might lawfully contract, but provided that seven per cent per annum should be the rate where none other was fixed by contract. A suit was instituted in the district court of that territory by Wakefield against Brewster and others to foreclose a mortgage made by the said Brewster and wife of certain lands to secure the payment of two promissory notes mentioned in the proceedings. These notes were both given by Brewster on the 11th day of July, 1854, whereby in one of them he promised to pay twelve months after the date thereof, to the order of Wakefield, the sum of five thousand five hundred and eighty-three dollars and twenty-five cents, with interest thereon at the rate of twenty per cent per annum from the date thereof, for value received; and in the other, promised to pay Wakefield the further sum of two thousand dollars twelve months after the date thereof, with interest thereon at the rate of two per cent per month from the date. Judgment of foreclosure was rendered in the district court, giving interest on the said notes at the rates therein respectively

agreed upon up to the date of the rendition of judgment. Taken on error to the supreme court of the territory, this judgment was affirmed with damages and interest, amounting in all to nearly twenty-one thousand dollars—almost three times the amount of the original indebtedness within less than four years. Taken to the supreme court of the United States on appeal, this case presented an illustration of those hard cases which are sometimes said to make bad precedents. That court held that interest should have been calculated on the notes at the rates therein stipulated respectively up to the maturity thereof, and after that time at the rate of seven per cent per annum. The announcement of this decision and opinion in 1859, startled the business and professional mind of the country as the writer well remembers; nor have they been followed and approved as the emanations of that court usually are. This decision being authority in Minnesota under the territorial government, has been followed under the state. Also in Kansas, Arkansas, South Carolina, Rhode Island, Kentucky, and Maine; and while the question may be considered an open one in New York and Connecticut, it has been decided the other way, *i. e.*, that the rate of interest being fixed in the note, it governs not only until maturity, but until payment, unless otherwise expressed, by the courts of Massachusetts, Indiana, California, Texas, New Jersey, Illinois, Wisconsin, Iowa, Nevada, Tennessee, Ohio, Michigan, and Virginia. This view also seems to be in accord with the recent decisions of the English courts as collated by C. J. Gray in his very able and exhaustive opinion in the case of *Union Institution for Savings v. City of Boston*, 129 Mass., 82. In this case, the learned judge cites all of the cases, American and English, and reaches the same conclusion as that announced by Mr. Justice Field in *Cromwell v. County of Sac*, 96 U. S., 51, that "the preponderance of opinion is in favor of the doctrine that the stipulated rate of interest attends the contract until it is merged in the judgment."

State, ex rel. Silver, v. Kendall.

But the best reasoned case, it seems to me, is that of *Spencer v. Maxfield*, 16 Wis., 185. The opinion of the court, by Mr. Justice Paine, answers every objection, and leaves it perfectly clear to my mind that the rule last stated is the correct one, and that none other ought to be adopted in this state.

The decree of the district court will therefore be modified in this court so as to give and allow interest in the several sums found due the defendants, Reuben R. Tingley and Joseph W. Hartley, at the rate of twelve per cent per annum to the date of said decree. That is to say the amount of judgment in favor of Reuben R. Tingley is declared and fixed at (\$2,231) twenty-two hundred and thirty-one dollars, and that the judgment in favor of Joseph W. Hartley is declared and fixed at (\$440.77) four hundred and forty dollars and seventy-seven cents. And the said decree of the district court as above modified is affirmed. By the Court,

JUDGMENT AFFIRMED.

15	202
19	206
15	202
40	874
15	202
45	42
15	202
52	36

THE STATE OF NEBRASKA, EX REL. ROBERT D. SILVER,
v. ALBERT G. KENDALL ET AL., BOARD OF PUBLIC
LANDS AND BUILDINGS, AND W. H. B. STOUT.

1. **Mandamus: WHAT ACTS MAY BE CONTROLLED BY.** The only acts which courts can control by the writ of mandamus are such as are purely ministerial, and with which nothing like judgment or discretion is connected.
2. —: **BOARD OF PUBLIC LANDS AND BUILDINGS.** In awarding the contract for the erection and completion of the main building of the new state capitol the board of public lands and buildings exercised their own judgment in matters respecting which they cannot be controlled by mandamus.

ORIGINAL application for mandamus.

James W. Savage, for the relator.

Isaac Powers, Jr., Attorney General, and *John C. Cowin*, for the respondents the Board of Public Lands and Buildings, and *Mason & Whedon*, *Burr & Kelly*, and *George E. Pritchett*, for respondent Stout.

LAKE, CH. J.

The relator, Robert D. Silver, was one of the two bidders for the contract for the erection of the main building of the new state capitol, and William H. B. Stout, one of the respondents, was the other, and the successful one; the contract having been formally awarded and let to him. The other respondents constitute the state board of public lands and buildings, to whom the duty of awarding and letting the contract belonged. This work, and the contract for doing it, were provided for in the act of the legislature entitled—"An act to provide," etc., "for the erection of the main building of the new capitol," etc., approved February 27th, 1883. (Laws, Ch. XCVI.) The relief sought by the relator is, to have said board required to cancel the contract entered into with Stout, and to make a new award upon the basis of his own bid. This we are unable to do, for the following reasons, stated as briefly as possible:

The relator seeks the relief prayed for on the ground that his bid conformed in every particular to the requirements of the statute, and was the best and the lowest, by the sum of forty-one thousand one hundred and eighty-seven dollars and twenty-five cents. If such were in fact the real character of his bid, as shown by the evidence, inasmuch as it was evidently contemplated by the legislature that such an one, if any, should be taken, we might pos-

sibly be able to grant the desired relief. But unfortunately for the relator, and perhaps for the state, such was not his bid in the estimation of the board, nor as shown by the evidence here produced.

Referring to the reasons assigned by the board at the time of making the award, for their action, we find the following: "That the bid of said Silver is not in accordance with the law, the advertisement heretofore adopted by this board, in that the sample of stone, considered by the board as the most essential sample of material to be furnished, did not comply with subdivision three, page ten of the specifications heretofore adopted, in that the stone so presented as a sample, did not come 'from a quarry which has been worked long enough to insure equal texture, quality, color, and sufficient quantity of the quality, texture, and color' to complete the said main capitol building. But that said sample of stone did come from some ledge of rock unknown to this board, or to Mr. Silver, who offered it as a sample. And the board do further consider that it would be against public policy and the best interest of the state, to award a contract for such an important building to be built from stone from a ledge of rock, undeveloped, and of which nothing is known," etc. "That the bid of W. H. B. Stout was in accordance with the law, the advertisement, and the specifications; that the sample of stone furnished by him was from a quarry which had been developed for several years, and from which the stone used in the construction of the east and west wings were furnished, and that the said quarry appeared in condition to furnish the necessary quantity and quality of stone desired," etc.

Without referring particularly to the evidence on the subject, we will say that these findings of the board as to the samples of stone exhibited by Silver and Stout respectively, are fully sustained; indeed, they are practically conceded to be true. In his testimony, Mr. Silver says: "This sample of rock I got from Mr. G. A. C. Smith be-

fore bidding for the east wing of the state house, August, 1881, I think. This is the same sample I then furnished. I got several samples, and I think this is one of them. I may be mistaken. I know not from what quarry Mr. Smith got the rock other than what he told me. I do not know of my own personal knowledge that it had been opened and worked. * * * I cannot swear whether it came from a quarry, and was not a piece of loose rock. * * * I did not then have a quarry from which I was to furnish the stone. * * * I knew where I thought I could get the stone from. Lansing & Yansen had a quarry from which I thought I could get the rock. * * * I do not know when this quarry of Lansing & Yansen was opened. * * * I had no reason to believe this piece of rock came from their quarry." The sample exhibited by Stout came from his own quarry on the Platte river, opposite the town of South Bend, which was fully developed. Such being the basis of the action of the board, the question to be decided is simply, whether it supports the award, or, in other words, whether, under the law governing their action, these findings respecting the samples of stone were material, and of a matter intrusted to their judgment and discretion?

Looking to the act of the legislature before referred to we find that the first step required of the board in the construction of this building was to select an architect, and adopt "plans and specifications," which they did under sec. 3 of said act. This section was evidently framed in the interest of William H. Wilcox, the architect selected; the board being directed, impliedly at least, to give him the job of furnishing the plans and specifications, if he would take it for the designated compensation, viz., "for a sum not to exceed three-fourths of one per cent of the contract price of the building," which he seems to have done. The next step of the board was, under section 6, to advertise for bids for the erection of the building, "and the completion

of the same in accordance with the plans and specifications adopted." In the consideration of bids, and the award of the contract, they were specially directed by section 8 to "have due regard to the samples of materials furnished with the bids," and to see to it that the facings and trimmings of the building should "be of limestone, and of equal quality, and of same color, as near as practicable to that used in the east and west wings, now completed." And by section 10, the board were required to "reserve the right to reject any and all bids," which, "in their judgment," were "not in accordance with the law and the advertisement."

Thus it is seen that the decision of the board on the merits of the bids, in the matter of their compliance with the requirements of the specifications, was made a very material part of their duty. The specifications, when adopted, became, as it were, a part of the law for their guidance afterwards. The invitation for proposals, the bids, and the award of the contract were all required to be with special reference to the plans and specifications, and subject to them. Looking to the specifications, we find they provide in respect to the stone, *first*, that it must "*correspond exactly with the two wings now completed,*" and *second*, that "*no stone will be permitted to be used, unless it is taken from a quarry which has been worked long enough to insure equal texture, quality, color, and sufficient quantity of the quality, texture, and color to absolutely conform with that used in the east and west wings of the new capitol.*"

It being conceded that, in this particular at least, Silver's bid was materially defective, it could not properly have been accepted. The specimen of stone which he submitted may have been fully equal in texture and durability to that produced by his competitor, but in every other of these requisites it was entirely deficient. Not only was it wanting in the particular on which the board placed their decision, but, as the testimony shows, in that of color also.

To any one at all acquainted with the meaning of language and the rules of construction of statutes, it must surely be evident from these brief references to the law and the specifications by which the board were governed, that in several particulars, and especially in the matter of whether the bids were "in accordance with the law, and the advertisement," the legislature intended to trust solely to their judgment. This being so, it is very clear that no court has the right, by the writ of mandamus, to interpose its judgment, to direct or influence their action. To do so would be usurpation. The only acts which courts can rightfully control by this writ are such as are purely ministerial, and with which nothing like judgment or discretion is connected. *United States v. Seaman*, 17 How., 225. *Same v. Guthrie*, Id., 378. *State, ex rel. Lewis, et al. v. Governor et al.*, 22 Wis., 110. *People v. The Contracting Board*, 27 N. Y., 378. Though they may require inferior tribunals to exercise judgment given them, or to proceed to the discharge of any of their functions, they "cannot control judicial discretion." Code of civil procedure, § 645.

Several other points were raised and discussed by counsel on the hearing, as tending to support the action of the board, but, as the one we have considered seems to have controlled the action of the board, and is conclusive in our estimation of the relator's rights under the law, we will not notice them. We desire it to be understood, that in denying the writ we place our decision squarely on the ground that, in awarding the contract to Stout and denying it to Silver, the board were required to and did exercise their own judgment in matters respecting which they cannot properly be controlled by mandamus.

(WRIT DENIED.

COBB, J., concurs.

MAXWELL, J., dissenting.

I am unable to give my assent to the opinion of the majority of the court, for the following reasons: The bid of Mr. Silver is more than \$41,000 less than that of Mr. Stout, and his proposition is to erect the building in *all respects in conformity to the plans and specifications and the law*. Mr. Stout can do no more than this, nor is it contended that he proposes to perform any more labor or expend any more money in the building than would Silver if the contract was awarded to him. Silver is a practical builder, trained to the business, and has erected a considerable number of public buildings in this and other states, among which are the state university and insane asylum, erected in 1871-2. He tendered a good and sufficient bond to enter into the contract and comply with its requirements. The ground upon which his bid was rejected was because he did not show that he possessed a developed stone quarry from which to obtain the ashlar for the building, and on the argument the further objection that his schedule did not include all the articles necessary to complete the building. These objections will be considered in their order.

The act for tearing down and removing the old capitol building and for the erection of the new, among other provisions, contains the following:

"Sec. 6. The board, within ten days after the adoption of plans and specifications, shall advertise for thirty days in three newspapers in the state of Nebraska, one in Chicago, Illinois, and one in St. Joseph, Missouri, for bids for the erecting of the main building of the said state house and the completion of the same in accordance with the plans and specifications adopted. The plans and specifications shall be kept on file in the office of the commissioner of public lands and buildings, and he is hereby made custodian, and it shall be his duty to see that they are carefully preserved, and they shall remain the property of the state.

"Sec. 7. The contract shall provide for the completion of the said main building by the first day of December, 1889.

"Sec. 8. The board of public lands and buildings in awarding said contract shall have due regard to the samples of materials furnished with the bids, and the facings of said building and the trimmings shall be of limestone, and of equal quality and same color as near as practicable to that used in the east and west wings, now completed.

"Sec. 9. The board shall require a good and sufficient guarantee to accompany each bid, to the effect, that should the contract be awarded to the bidder, he will within twenty days from the awarding of said contract with the state for the erection of said main building, according to the advertisement and his bid, and that he will further give a good bond running to the state of Nebraska, in the sum of three hundred thousand dollars, to be approved by the governor, the bond conditioned for the faithful performance of his contract, according to law and terms thereof.

"Sec. 10. The board shall reserve the right to reject any and all bids, if in their judgment they are too high, or not in accordance with the law and the advertisement; and in that event they shall proceed to advertise as before until there is a favorable bid received by the board. *Provided*, That said board shall reject all bids for said main building for which the bid or bids be for the sum of four hundred and fifty thousand dollars or upwards. *And it is hereby provided*, That said board shall not expend any sum exceeding said sum of four hundred and fifty thousand dollars in the erection and full completion of said main capitol building.

"Sec. 11. Immediately upon the awarding of the contract the board shall appoint a competent and practical builder as superintendent of construction, whose duty it shall be to see that the plans and specifications of said building are faithfully carried out in construction by said

contractor, and it is hereby made the special duty of the superintendent to see that the proper material is used in the construction of said building, and that all work is done in a skillful and workmanlike manner.

"Sec. 12. It shall be the duty of the superintendent to make out and return to the board, monthly statements, showing the amount of work done on said main building, and materials furnished by the contractor, and perform such other services, and give such other information from time to time, as the board may require. Such statements and information shall always be in writing and sworn to by the superintendent.

"Sec. 13. The superintendent shall, before entering upon the discharge of his duty, enter into a good and sufficient bond to the state of Nebraska, in the sum of twenty-five thousand dollars, to be approved by the board, conditioned for the faithful performance of his duties as specified in this act.

"Sec. 14. The superintendent shall be allowed such compensation as the board of public lands and buildings shall decide, not to exceed two per cent on the contract price of said building, or of the work done on the same, under his supervision, which amount shall be certified by the board, and on such certificate the auditor of public accounts shall draw his warrant on the general fund of the state for said amounts, from time to time as the work progresses, not to exceed the rate of one thousand dollars per year for the actual time employed.

"Sec. 15. During the progress of the construction of said building, the superintendent shall make out and file with the board, monthly estimates showing the amount of work done on said main building and material furnished by the contractor, together with such other information from time to time as the board may require him to give, and the board shall, after a careful examination of such estimate, if correct, certify the same to the auditor of public

accounts, showing the amounts thus found due the contractor, and upon such certificates being thus presented to the auditor, he shall draw his warrant upon the special fund created for the erection of said building, in favor of the contractor, for eighty-five per cent of the amount thus certified by the board, and when the contract is completed, and the final estimate made, the board shall certify this fact to the auditor of public accounts, who shall then draw his warrant as before, including in the said last warrant the fifteen per cent retained, making the balance due the contractor upon his contract."

The only samples of material furnished by either Stout or Silver consisted of small cubes of rock from near Louisville, in this state. No objection was made by the board to either the color or texture of the piece exhibited by Silver, nor was his bid rejected on that ground. The question then arises, had the board any authority to impose upon bidders the condition that to be successful they must own a developed quarry? It will be observed that they were required to advertise for bids in three newspapers in this state, one in Chicago, Illinois, and one in St. Joseph, Missouri, for bids for erecting the main building, and the completion of the same according to the plans and specifications.

The evident object of thus advertising was to invite proposals from builders. The legislature in effect provided that notice of the lettings should be given as wide a publicity as possible in order that the state might have the benefit of competition. In order to invite competition, bidders must not be burdened with onerous conditions which would have the effect to deter them from bidding, and might prevent all competition. Suppose it was made a condition that the person bidding should own a pine forest from which the pine lumber was to be manufactured that was used in the building, or a forest of oak or other hard wood, or that he possess an iron foundry or rolling

mill, or be engaged in the manufacture of brick, it would be said that such conditions were unauthorized and would entirely defeat the object of the law, viz.; competition, as all these articles may be bought in abundant quantities in the open market. But wherein do these conditions differ from that in regard to stone? A bidder from Chicago or St. Joseph might be a thoroughly competent builder, but possess no quarry, but relying upon his ability to purchase material in the market make a proposal which would be met with refusal—not because he was not a responsible man and able to complete his proposed contract—not because he in all probability would erect a substantial building conforming in all respects to the plans and specifications, but because he did not show that he had expended a large sum of money in preparation for a contract that he might never receive. With as much propriety, the board might impose a condition that the successful bidder should be possessed of a certain amount of wealth as evidence of his ability to perform his agreement. The fact that a contractor tenders a satisfactory bond is evidence of his good faith, and of his intention and ability to perform the contract, and that is all the security that the legislature has seen fit to require. There might be some propriety perhaps in requiring a bidder to own a developed quarry if the stone heretofore used in the east and west wings was a rare and valuable kind, and unless the same variety was used in the new building, there would be danger of marring the appearance of the whole building. But the testimony tends to show that the stone used does not compare with many other varieties used in durability—that in fact it is easily affected by the action of the weather, and is not as durable as many other kinds; that it is found in large quantities on both banks of the Platte river from below Ashland to near its mouth; that the same quality of rock is found in abundance in Otoe county, in western Iowa, in Illinois, Ohio, and other places. The testimony

also tends to show that the stone used in the west wing, built under the supervision of a committee of the senate and house of representatives, is a fair quality of that kind of rock and nearly of a uniform color, although one witness testified, "the building is like Joseph's coat, so many colors that you would have to have a good many samples to tell the color." And the testimony also tends to show that a portion of it is filled with sand and clay streaks. There was no particular object therefore in obtaining rock from that particular quarry, as almost any change would seem to be beneficial. It will be observed that the statute simply provides that limestone shall be used as near of the color and texture of that heretofore used as practicable, and that no restriction is placed upon the contractor. He may obtain it wherever he can. But it is said that the legislature gave the board authority to adopt plans and specifications, and that as the specifications contained a condition that the party bidding should possess a stone quarry, that therefore this condition is authorized by law. The phrase, "plans and specifications," has a well defined meaning in this state at least. A plan when applied to a building in an architectural drawing representing the horizontal sections of the various floors or stories of the building, the disposition of apartments and walls, with the situation of the doors, windows—in fact represents the different stories as they are to be built, and the whole as it will appear when completed. The word "specifications" when applied to a building means a specific and detailed statement of the materials to be used in the building, and the manner of performing the work.

Any matter that does not relate to either of these is not included in the phrase "plans and specifications." The board of public lands and buildings is created by the constitution and its powers are defined as follows: It "shall perform such duties, and be subject to such rules and regulations as may be prescribed by law." The board pos-

sess no inherent power. For every act that it performs it must produce its authority from the statute, and any act performed by it without statutory authority is null and void.

The condition in the specifications above referred to, therefore, being in excess of their authority, is a nullity. In the argument of the case, a great deal of stress was laid by Mr. Stout's attorneys upon the fact that the schedule filed by Silver did not cover all the articles in the specifications, and we were told that he thereby intended to defraud the state by leaving the dome and building unfinished. It seems that the board required a schedule as a basis on which to make monthly estimates of the amount to which the contractor would be entitled, but they expressly provided that it should not be binding upon them. It has nothing to do with the contract, and whether properly made or entirely omitted, is immaterial. Mr. Wilcox, the architect, stated on cross-examination that the only effect of the omission of certain articles from the schedule, was to deprive the builder of monthly payments thereon; but under the statute, as the superintendent is required to make monthly estimates from the *work performed* and *material furnished*, and as the schedule is entirely unauthorized by law it amounts to nothing and may be entirely disregarded. But the same defect existed in the schedule of Mr. Stout, while his contained several thousand dollars as the value of frescoing which is not mentioned in the contract. This objection therefore is untenable.

It is said, however, that the board of public lands and buildings is a co-ordinate branch of the government, created by the same constitution that created this court; that it is charged with certain duties which it is required to perform and that this court will not interfere with its action in the performance of these duties. In other words that in the matter of letting contracts, the board has a discretion which will not be controlled by this court—is in fact, a law unto itself.

I concede that in any case where the law requires an officer to use his judgment in deciding a matter properly before him, that he cannot be compelled by mandamus to decide in a particular manner. Thus, the constitution imposes upon the governor the duty of examining bills passed by the legislature and approving or vetoing the same. He is clothed with the exclusive power to determine what his action shall be in the premises, being a part of the law-making power, and answerable alone to the people. His action therein therefore cannot be controlled. So in extradition cases, being a matter of state comity, mandamus will not lie, and the courts properly hold that they have no power to control the performance of purely executive and political functions. But where the duties required of him are purely ministerial—such as might with equal propriety be required at the hands of any other officer, mandamus will lie. *State v. Chase*, 5 O. S., 528. *Tenn. & Coosa R. Co. v. Moore*, 36 Ala., 371. *Cotten v. Ellis*, 7 Jones, 545. *Magruder v. Swann*, 25 Md., 173. *Middleton v. Low*, 30 Cal., 596. *Harpending v. Haight*, 39 Id., 189. High on Ex. Rem., § 119 and note. In a free government no officer is above the law, and if he fails to perform a clear duty mandamus will lie to compel performance.

The same rules apply to any other state officer, and no officer from the highest to the lowest is beyond the reach of mandamus if the duties required of him are purely ministerial. Thus, in *Hollister v. The Judges*, 8 O. S., 201, an application was made for a mandamus to compel the judges of the common pleas to restore to a bill of exceptions certain material words which it was alleged had been stricken out a retiring judge. The judges answered that having just by come upon the bench they knew nothing about the facts, and had no power over the clerk; but the supreme court held this was no defense. That it was their duty to require the parties to produce their proofs, and act upon such proofs in the same manner as in other cases that came before them,

and a peremptory writ was awarded. And the supreme court of the United States held that a judge who tried the cause would be compelled to sign the judgment record. *Ins. Co. v. Wilson*, 8 Peters, 291. And to settle and sign a bill of exceptions. *Ex. parte Crane*, 5 Id., 189. So where the statute makes it the duty of a court or judge to approve official bonds, and a sufficient bond is tendered, mandamus will lie to compel its approval. *State v. Ely*, 43 Ala., 568. *Beck v. Jackson*, 43 Mo., 117. *People v. Fletcher*, 2 Scam., 482.

Neither does the fact that the board of public lands and buildings is created by the constitution withdraw it from the control of the courts. The board, although created by the constitution, is governed entirely by the provisions of the statute. Nearly all its duties are ministerial, and in the matter of letting contracts, there is no doubt that its duties are of that character. Having adopted plans and specifications, and invited bids thereon, its only duty in awarding the contract was to ascertain which was the lowest bidder, and if he had tendered a sufficient bond. These duties were purely ministerial in their nature, and neither require nor admit of the exercise of discretion. In the case of *Boren & Guckes v. Commissioners of Darke Co.*, 21 O. S., 311, the county commissioners of Darke county, who were entrusted with the management of its affairs, and possessed much greater powers than are given to the board of public lands and buildings, let a contract for the erection of a court house to the highest bidder. The court in effect held that the duties were ministerial; that, notwithstanding they had let the contract to the highest bidder, yet, as that contract was unauthorized, a peremptory mandamus was awarded compelling them to award the contract to him who was entitled to it—the lowest bidder. That case was followed in this state in the case of *The People v. Commissioners of Buffalo Co.*, 4 Neb., 150, and it is a fact well known that the district court of that county compelled the

commissioners of that county to let the contract for the erection of the bridge to the lowest bidder, which was done at \$8.50 per lineal foot in place of \$13, the bridge being more than 6,000 feet in length.

This case was followed and approved in that of *Follmer v. Nuckolls Co.*, 6 Neb., 204, and in *State v. York Co.*, 13 Neb., 57. In the case last cited, the county commissioners of York county had let the contract for supplies for the county to one not entitled to it, but this court compelled them to let it to the proper party. I think it will be difficult to apply a rule to county commissioners, who have greater powers than the board of public lands and buildings, and not apply the same rule to it. In support of the opposite view, we are referred to the case of the *People v. The Contracting Board*, 27 New York, 378, decided in 1863. In that case, the contracting board advertised for proposals to keep the Cayuga and Seneca canals in repairs for a series of years, the statute requiring them to let the contract to the lowest bidder. A certificate of deposit of \$4,000 in cash in some banking house in good credit, payable to the auditor, was required of each bidder. The lowest bidder filed a certificate for four thousand dollars, omitting the words "in cash." Upon this pretext, the contracting board refused to consider his bid, and let the contract to the next highest bidder.

The supreme court granted a mandamus to compel the awarding of the contract to the lowest bidder. This decision was reversed by the court of appeals, Selden, J., dissenting. In the statement of facts, it clearly appears that the only reason the bid was rejected was because the words "in cash" were not in the certificate; yet Emmett, J., who delivered the opinion, affects to assume that some other reasons existed. The opinion is not very satisfactory, and fails to meet the questions at issue. In the dissenting opinion of Judge Selden, the objections, in the majority's opinion, are completely answered, and it is shown that the

decision is a complete departure from the former decisions in that state. The same court in the case of *Doolittle v. Supervisors*, 18 New York, 155, had held that a liability to increased taxation from illegal taxes affected all taxpayers alike, and that an action to enjoin the proceedings could only be brought by the proper public officer, and could not be brought by a private taxpayer. The taxpayers of the state being thus bound hand and foot, and the lowest bidders on a public contract having no rights which the courts would enforce, is it a matter of surprise that Tweed soon afterward seized the government of its chief city, and, under various pretended contracts, robbed it of millions of dollars?

Nor did the evil stop here, as it seems to have extended to all public contracts. Whether these robberies were the fruit of these decisions or not, I leave others to determine, but following as they did the decisions in question, there is certainly cause for reflection.

In the first case cited from New York, it is said in substance that the lowest bidder has no rights as such which the courts will enforce. The law is settled the other way in this state and Ohio, from whence our practice was copied, and it is unnecessary to discuss the question; but that our decisions are sustained by reason and the clear weight of authority, I think it is apparent. Our constitution provides that all courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation shall have a remedy by due course of law, and justice administered without denial or delay; yet it is proposed by this court, in the face of this plain constitutional provision, to close the doors of the court in certain cases; to hold that certain officers are above the law, and not amenable to the courts. The logical effect of the decision is that the board may let a contract for any sum that they please, and the court will not interfere. Such a power is liable to gross abuse, and the court has no legal or moral right thus to

deny to any citizen his rights. It was the boast of the common law that there was no wrong without a remedy, *ubi jus, ibi remedium*. *Johnstone v. Sutton*, 1 T. R., 512. Coke Litt., 197 b. Broom's Legal Maxims, 191. But here is a case in which the court refuses to grant any relief. In conclusion, I do not wish to impugn the motives or action of the members of the board. I have every reason to believe that they acted in good faith, and that there was simply an error of judgment. But the precedent is destructive of public virtue, and is liable hereafter to lead to great abuses and wrongs. In my view, the board should have accepted the lowest bid, or rejected both and advertised again for proposals; not having seen fit to reject both bids, the lowest bidder was entitled to the contract. A peremptory writ should therefore be awarded.

THE BURLINGTON & MISSOURI RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR, V. AUGUSTUS REINHACKLE, DEFENDANT IN ERROR.

1. **Railroads: OBSTRUCTING STREET IN CITY.** The authorities of a city have no power to authorize a railroad company to permanently appropriate and obstruct a portion of a street without compensation to such lot owners abutting thereon as are specially injured thereby.
2. ———: **EMINENT DOMAIN: DAMAGES.** The mode provided by statute for assessing damages for right of way does not apply where property is damaged but no portion thereof taken.

ERROR to the district court for Cass county. Tried below before POUND, J.

T. M. Marquett and *J. W. Deweese*, for plaintiff in error. The remedy provided by statute is complete. Mills on Eminent Domain, 87. *Lindell's Adm'r v. Hannibal & St.*

15	279
16	118
16	119
18	173
15	279
26	368
15	279
34	248
15	279
55	130

Joe R. R. Co., 36 Mo., 543. *Smith v. Chicago R. R. Co.*, 67 Ill., 198. *Little Miami R. R. Co. v. Whitacre*, 8 Ohio State, 590. *Hovey v. Mayo*, 43 Me., 332. *Spangler's Appeal*, 64 Pa. St., 387. On fourth instruction, cited: *C. B. Railroad v. Twine*, 23 Kan., 594. On question to Reinhackle, cited: *Stone v. Railroad*, 68 Ill., 394.

Smith & Beeson, for defendant in error, cited: *Haynes v. Thomas*, 7 Ind., 38. *C. B. R. R. v. Twine*, 23 Kan., 585. *Park v. R. R.*, 43 Iowa, 639. *Lackland v. R. R.*, 31 Mo., 180. *Street Railway v. Cumminsville*, 14 Ohio State, 523. *Gottschalk v. C. B. & Q. R. R.*, 14 Neb., 550. *Dillon Mun. Corp.*, § 557 and note. *Id.*, § 496 and note 1.

MAXWELL, J.

In the year 1858 the defendant purchased lot 3 in block 47 in the city of Plattsmouth, said lot fronting east on Second street in said city. He thereupon erected a dwelling-house on said lot, in which his family has resided from that time until the present. Second street, the testimony shows, is seventy feet in width. About the year 1870 the plaintiff herein had erected machine shops on its own land abutting on the east side of said street immediately opposite the defendant's premises, and obtained leave from the proper city authorities to erect a fence on the east side of said street, inclosing a small portion of the same. In 1877 the machine shops were destroyed by fire, and new ones erected at a point in the southern or south-eastern portion of the city, some distance from the defendant's premises. The company thereupon applied for and obtained leave from the city authorities to use the east side of said street for the purpose of laying tracks thereon and using the same for railroad purposes. In pursuance of this authority, the company laid two tracks on the east side of said street immediately opposite the defendant's premises and extending for a considerable distance north and south, occupying

about thirty feet in width of said street. The western track, near the middle of the street, is used for the purpose of loading and unloading goods on and from the cars, and is constantly nearly filled with cars to be loaded or unloaded. And the street is further obstructed by teams bringing or carrying away goods therefrom. These facts are undisputed. In February, 1881, the defendant in error commenced an action against the plaintiff in the district court of Cass county, to recover damages to his property caused by laying said tracks and the obstruction of said street, the date of the injury being alleged to be July 1st, 1877. Issues were joined and a trial had, in which the jury returned a verdict for the defendant in error for \$500. A motion for a new trial having been overruled, judgment was entered on the verdict.

The first error assigned by the plaintiff in error in its brief is, that the fee to the street being in the city and not in the adjoining lot owner, he has no remedy where a sufficient portion of the street is left for the use of the public. The testimony tends to show that the property in question at the time of the alleged injury was worth from \$800 to \$1,500, and that it has depreciated in value about one-half by the obstructions complained of.

The fee of streets is in the public; but it is held in trust for public use. The municipal corporation cannot sell or permanently obstruct the streets without compensation to the owners of property specially injured thereby. The trust like any other must be exercised in good faith. It was created to give permanency to streets and apply them wholly to the use of the public. But in addition to the public benefit, every lot owner whose lots abut on a street has a special interest therein distinct from the public at large. Unless the owner can have free and unobstructed access to his property it will be of but little value. In *Crawford v. The Village of Delaware*, 7 Ohio State, 459, the supreme court of Ohio say: "The latter (lot owners)

have a peculiar interest in the street, which neither the local nor the general public can pretend to claim; a private right of the nature of an incorporeal hereditament legally attached to their contiguous grounds and the erections thereon; an incidental title to certain facilities and franchises assured to them by contracts and by law, and without which their property would be comparatively of little value. The easement appendant to the lots, unlike any right of one lot owner in the lot of another, is as much property as the lot itself."

This decision was cited and approved in *Street Railway v. Cumminsville*, 14 O. S., 547, and again in *Hatch v. C. & I. R. R. Co.*, 18 Id., 92. These decisions commend themselves to us as being just, alike to the lot owner and to the corporation seeking to appropriate the street. We therefore hold that municipal authorities have no power to grant authority to permanently obstruct a street without compensation be made to lot owners abutting thereon who suffer special damages by such obstruction.

Second. It is contended that an action for damages will not lie because the statute provides a mode of estimating the same, which is exclusive. The statutory mode of ascertaining damages is applicable only in cases where some portion of the claimant's estate is taken. It does not apply and was not intended to apply to cases where lands are injuriously affected but no portion thereof taken, as where a portion of a street is appropriated.

Third. Objection is made to the fourth instruction, which is as follows: "If you find from the testimony that defendant has wrongfully appropriated said Second street to its own use, permanently occupying and using the same, and has thereby caused damage to plaintiff's property by blockading said street with its cars and rolling stock, thereby causing plaintiff's property to depreciate in value, the plaintiff will be entitled to recover the difference between the market value of the property before such unlawful appro-

pr'ation and the value of the same after such unlawful appropriation and use by said defendant."

The objection urged by plaintiff's attorneys against this instruction is, that it is misleading, because the jury might infer that the mere temporary blocking up of the street by the cars of the railroad company would entitle Reinhackle to damages for the depreciation of his property. It is a sufficient answer to say that the testimony tends to show a permanent obstruction on the street—in other words, a side track built apparently for the express purpose of holding cars to be loaded and unloaded, and that a considerable number of cars are found constantly standing on the track. The testimony, therefore, does not sustain the construction contended for.

Objection is made to the 16th question to Reinhackle on his direct examination, which is as follows: "State the condition of that street with those cars stopping, and with teams there loading and unloading?" The question was proper, and the answer merely showed that the street was obstructed, and that, in consequence, there was but little travel thereon. The court might have directed the jury to view the street with the alleged obstructions thereon, but a description of the same was proper testimony. And the same rule applies to the 25th question, which was as follows: "What effect has the operating of these cars on these tracks on your residence, if any?" After a careful examination of the record we see no material error therein, and it is apparent that substantial justice has been done. The judgment must therefore be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

EDWARD BATES, PLAINTIFF IN ERROR, V. YORK COUNTY,
DEFENDANT IN ERROR.

Taxes: RECOVERING BACK. On the facts stated in the petition, *Held*, That moneys paid for the purchase of lands for delinquent taxes could not be recovered.

ERROR to the district court of York county. The petition alleged in substance that, on the 25th of December, 1879, plaintiff purchased of the county treasurer certain tracts of land for the delinquent taxes of 1879; that said lands were not reported by the auditor of the state to the county clerk of said county as lands becoming taxable for the first time, but were assessed without being reported or forwarded by the auditor for such purpose; that the sale of such lands for taxes to the plaintiff by the treasurer of said county was made without any public notice of such sale being given before selling at private sale; that said lands were homesteaded, and first proof made thereon March 9, 1878, April 6, 1878, May 22, 1878, Oct. 14, 1878, and March 12, 1879. A demurrer to the petition was sustained by GASLIN, J., sitting there, and the cause dismissed.

I. Eddy Bennett, for plaintiff in error, cited: *Hamilton County v. Bailey*, 12 Neb., 59. *Otoe County v. Gray*, 10 Neb., 569. Gen. Stat., 925, § 77. *Cooley Taxation*, 216, 374. *Donovan v. Kloke*, 6 Neb., 127.

Scott & Frank, for defendant in error. Plaintiff's right of action did not accrue until after the purchase, and the failure of the title and this right of action was modified by the statute so far as the action against the county was concerned. *Kertschacke v. Ludwig*, 28 Wis., 430. *Dillon v. Linder*, 36 Wis., 344. Comp. Stat., page 425, § 131. This being an action between the purchaser and the county for an alleged wrongful act of the treasurer, the purchaser

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comes strictly within the rule of *caveat emptor*. Cooley on Taxation, 329-375. *Lynde v. Melrose*, 10 Allen, 49.

MAXWELL, J. .

This is an action to recover from York county certain moneys paid by the plaintiff to said county in the purchase of lands for delinquent taxes for the year 1878. The plaintiff has taken out no tax deed nor sought one, nor has he endeavored to enforce the lien against the land acquired by the tax purchase and failed. There was no misrepresentation to induce him to purchase, and for aught that is alleged in the petition, he knew all the facts in relation to the title he would obtain, before purchasing. In any event he fails to make a case entitling him to recover the money paid. The case of *Foster v. Pierce County*, ante p. 48, in many respects is analogous to that under consideration. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JOHN T. LANE, PLAINTIFF IN ERROR, V. JACOB STARKEY,
DEFENDANT IN ERROR.*

15	285
18	477
20	587
15	285
35	457
15	285
52	282

1. **Sale: FRAUD: BONA FIDE PURCHASER.** One W., intending to hinder and defraud his creditors, sold his stock of goods and book accounts to S., taking his notes therefor, S. being aware of and sharing in the fraudulent intent. S., twenty days afterwards, having information that an attachment was about to be levied on the goods as the property of W., sold the same to S., an employe, taking his notes therefor. *Held*, On the facts proved, that S. was not a *bona fide* purchaser.
2. ———: ———: **BURDEN OF PROOF.** The burden of proving a valuable consideration is upon the purchaser when proof of that fact becomes necessary to his protection against creditors.

ERROR to the district court for Saline county. Tried below before MORRIS, J.

Brown & Ryan Brothers, for plaintiff in error, reviewed the testimony at length, and cited, *inter alia*: *Temple v. Smith*, 13 Ind., 514, and cases cited. *Burrill Assignments*, § 341. *Bump*, 89. *Glenn v. Glenn*, 17 Iowa, 501.

Hastings & McGintie, for defendant in error, cited: *Thornton v. Hook*, 36 Cal., 223. *Nichols v. Patten*, 18 Me., 231. *Fifield v. Gaston*, 12 Iowa, 218. *Clark v. Tennant*, 5 Neb., 557. *Howe v. Howe*, 99 Mass., 89. *King v. Moon*, 42 Mo., 551. *Linn v. Wright*, 18 Tex., 317. *Waterbury v. Sturtevant*, 18 Wend., 353. *Kittle v. St. John*, 10 Neb., 605. *Hedman v. Anderson*, 6 Neb., 400. *Bump on Fraudulent Conveyances*, 563. *Atwood v. Impson*, 5 C. E. Green, 150. *Seymour v. Wilson*, 19 N. Y., 417. *Shontz v. Brown*, 27 Pa. S., 123. *Pattison v. Stewart*, 6 W. and S., 74.

MAXWELL, J.

In July, 1882, one F. M. Woodruff had a store containing general merchandise at Friendville, in this state, and was embarrassed by his liabilities. The total amount of his debts at this time seems to have been about \$4,000, and the value of the stock the testimony shows to have been from \$2,700 to \$4,000, while the book accounts were from \$300 to \$1,200. Woodruff was indebted to one Stone, who kept a bank at that place, a little over \$200 for money loaned. Woodruff's creditors were pressing him very hard at this time, when he sold his entire stock, including the book accounts, to Stone for \$2,000, which was paid by deducting the amount Woodruff was owing Stone, and by Stone giving his promissory notes for the balance—one of said notes for \$500, with interest, due in six months; one

note for \$500, without interest, due in twelve months; one for \$500, without interest, due in eighteen months, and a note for the remainder, without interest, due in two years. Stone, at the time of the alleged purchase, had full notice of the debts owing by Woodruff, and the testimony clearly shows that one of the objects he had in view in purchasing said goods was to hinder and delay if not defraud the creditors of Woodruff. This transaction took place on the 6th of July, 1882. There is considerable testimony tending to show that Stone did not purchase the goods absolutely, but merely to secure his own claim, and to enable Woodruff to settle with his creditors. This is denied by Stone, but is sustained by the clear weight of testimony, and it certainly seems very strange that a merchant should sell his entire stock for not to exceed one-half of its face value, and receive as payment therefor only long time notes without interest. Certain creditors of Woodruff threatened to attach these goods to secure their claims, and Stone, evidently alarmed, made several efforts to sell the same before the attachments were levied. On the 26th of July, 1882, he was informed that an attachment was about to be levied on the goods in question, and he at once went to a man named Hugh Seed, and offered to sell him the goods for \$2,500, taking his notes therefor, payable in one, two, three, and four years. Mr. Seed agreed to take the goods on these terms, and the parties went to the store where the goods were kept, and the notes were drawn up ready to be signed, when Seed, evidently anticipating trouble if he purchased the goods, refused to take them and sign the notes. This was between two and three o'clock in the afternoon of the 26th. Stone thereupon sold the goods to one Starkey for \$2,500, taking his notes therefor, payable to himself. Immediately after this alleged sale, Starkey and the former clerk employed by Woodruff and Stone commenced to invoice the goods, the invoice being completed on the following Sunday. In the forenoon of the 27th of July,

an attachment was levied upon a portion of the goods in question as the property of Woodruff, the amount levied upon being \$714.95. This action was brought by Starkey against the officer levying the attachment to recover the value of the property seized under the order. A verdict was rendered in favor of Starkey in the court below, and a motion for a new trial having been overruled, judgment was entered on the verdict. The question for determination in this court is, was Starkey a *bona fide* purchaser of the goods in question?

It appears from the testimony that he was an employe of Stone at \$16 per month and board, at the time of this purchase; that he had been in the employ of Stone at Friendville for about two years; that prior to that time he had resided with his father in Hamilton county, and he states in his testimony "a part of the time I milled it,"—tended mill for his brother. It nowhere appears that he possessed any property whatever. Nor does the testimony show that at the time of the levy on the goods in question, he had paid one cent thereon. But it is said he gave his negotiable promissory notes for the goods, and that this is sufficient to prove a valuable consideration. Whether negotiable promissory notes given under the circumstances of this case would be sufficient or not, we will not determine, as the record nowhere shows such notes to have been given. It is in evidence that notes were given to J. D. Stone, but no copy is set out nor does their character appear. It does appear, however, that Stone, knowing that an attachment was about to be levied, hurriedly sells these goods to Starkey, who knew but little or nothing about the business—the alleged purchase being made in the afternoon or night of July 26th, and the notes given at that time, while the invoice was made afterwards. No reason is given why the invoice was not made before the sale, but it is apparent that the reason was the fear of Woodruff's creditors, and the testimony tends to show that there was suf-

ficient under the circumstances to put Starkey upon inquiry. The question of a *bona fide* purchase has been before this court a number of times.

In *Gregory v. Whedon*, 8 Neb., 377, it is said: "In order to constitute a person a *bona fide* purchaser he must have parted with something that is valuable upon the faith of his purchase before he had notice of any prior right or equity;" and in *Savage v. Hazard*, 11 Id., 327, it is said, "to constitute a *bona fide* purchase for a valuable consideration, it must be without notice, and with the money actually paid." In both of these cases the purchasers had given their promissory notes, but the sales were held to be invalid. The rule is well settled that the burden of proving a valuable consideration is upon the purchaser when proof of that fact becomes necessary to his protection against either creditors or subsequent purchasers. 1 Am. Leading Cases (4th Ed.), 53. *Battle v. Jones*, 2 Ala., 314. Abbott's Trial Ev., 448-9 and cases cited in notes. This Starkey has failed to do. It is stated in the defendant's brief that it devolves upon the plaintiff to show that the transactions between Woodruff and Stone, and Stone and Starkey, were fraudulent. It is a fundamental principle that fraud is never presumed—that is, when a sale is alleged to be fraudulent as to creditors it devolves on the party alleging the fraud to prove it. But the proof of fraudulent intent need not extend beyond the vendor and vendee. The question as to a purchase from a fraudulent vendee is whether or not he acted in good faith. If he did, he is protected. If he did not so purchase, the goods in his hands are still liable for the debts of the real owner. That is, the goods in the hands of the fraudulent vendee were liable for the vendor's debts. Therefore, if one purchase with notice of the vendee's title, or have facts sufficient to put him upon inquiry, he takes merely the title possessed by the vendee. There may, however, be an intent also on the part of such purchaser to defraud or aid in defrauding the creditors of the

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vendor which may be proved to show his want of good faith. The testimony in this case fails to show that Starkey was a *bona fide* purchaser, and therefore entitled to protection, and for that reason the judgment must be reversed. As there must be a new trial in this case, we desire to say that the cross-examination of both Stone and Starkey was too much restricted. In cases of this kind the facts can only be ascertained by a full examination of the witnesses. Then, too, the very large number of objections interposed by the attorneys, almost in the same form to all questions, seem to have been unnecessary. It is the duty of an attorney to protect the rights of his client by proper objections and exceptions; but this does not authorize nor require continued and persistent objections to proper and competent testimony. The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

COBB, J. concurs.

LAKE, CH. J., dissenting.

This cause comes here from Saline county. The action in the court below was brought by the defendant in error to recover damages for an alleged wrongful seizure by the plaintiff in error of a portion of his stock of goods under an order of attachment.

The order of attachment was issued to the plaintiff in error, as sheriff, at the suit of *Samuel P. Farmington et al. v. Francis M. Woodruff*, who a short time before had been engaged in the mercantile business in Friendville, in said county, and from whom the defendant in error had, mediately, obtained the goods in question. The intervening purchaser from Woodruff was J. D. Stone, who was one of his creditors. The defendant in error was in possession of the goods when the attachment was levied, and he

claimed to own them under a sale from Stone. The defense interposed was that the defendant's title had been obtained in fraud of Woodruff's creditors, and that the goods were therefore attachable, as belonging to him, in satisfaction of their demands. The jury, however, found otherwise, and judgment was rendered accordingly. The only question for present consideration is simply whether the verdict is supported by the evidence.

If we were dealing only with the sale from Woodruff to Stone, if the verdict rested on that alone, it is quite probable it could not be sustained. For although Stone doubtless had for one object, in making the purchase, the payment of his own small demand against Woodruff, I think the evidence shows beyond all reasonable doubt that he had the further object of unjustly benefiting himself at the expense of Woodruff's creditors, by getting his stock of goods for several hundred dollars less than they were really worth, and to that extent, if not altogether, defeat them in the collection of their claims. These claims were pressing upon Woodruff, and Stone knew it; they amounted to about four thousand dollars. The goods transferred to Stone, as Woodruff testified, were worth about thirty-eight hundred dollars, and the book accounts about one thousand dollars more. Stone paid for them both two thousand dollars by the satisfaction of his own demand of about three hundred dollars, and his four promissory notes, three for five hundred dollars each, payable in six, twelve, and eighteen months, and one for about two hundred dollars, payable in two years without interest. This was clearly a fraudulent transaction, and voidable at the suit of Woodruff's creditors.

But was the defendant in error aware of the fraudulent character of Stone's title when he took it? In other words, did he know that one of Stone's objects in buying the stock was to defeat, hinder, or delay Woodruff's creditors in the collection of their claims? Or rather, as the question is

presented to this court, can the refusal of the jury to so find on the evidence before them be sustained? I think it can and should be.

It is a principle of universal recognition that in the absence of proof fraud is never to be presumed. Therefore, if the right of a party in a suit depends upon the establishment of fraud in another, he must prove it in order to succeed. The burden of proof is on him whose success depends on showing the fraud. *Clark et al. v. Tennant*, 5 Neb., 549. 3 Wait's Actions and Defenses, 445, § 12.

Such being the law by which the case is to be judged, what is the evidence to which it is to be applied? Conceding that Stone was a fraudulent purchaser, all that was shown beyond this was simply that the defendant in error had resided in Friendville about one year before he purchased the goods, during which time he had been in the employ of Stone or his son, running a flour and feed store at sixteen dollars per month and board. Before going to Friendville he had lived in Hamilton county about three years, working in his brother's mill. This is all that was shown of Starkey's antecedents, and nothing whatever as to his financial ability or standing.

Stone, after his purchase from Woodruff, had run the store about twenty days when he proposed to sell out to Starkey. He had endeavored to sell to other parties. Finally Starkey concluded to purchase on the terms offered him, which were the payment of twenty-five hundred dollars for the stock then on hand, for which he gave his promissory notes payable in six, twelve, eighteen, and twenty-four months, all except the first being without interest. This sale was completed and Starkey in possession of the goods before the attachment was levied. It is not shown that before the levy of this attachment Starkey knew or had reason to believe that Woodruff was in embarrassed circumstances, or even that he had a single creditor in the world. The stock so purchased by Starkey invoiced be-

tween twenty-seven and twenty-eight hundred dollars. Surely there is nothing in all this tending in the least degree to impeach the motives of Starkey in making the purchase, or that evinces a purpose to aid in defrauding the creditors of Woodruff.

But there is one other item of evidence which seems to be the chief reliance of the plaintiff in error to show bad faith on the part of Starkey. It is found in the deposition of Woodruff, taken in the jail in the city of Chicago, where he was then confined at the instance of the plaintiffs in error, presumably—although this is not clear—for alleged dishonesty in contracting the debt on which the attachment issued.

It seems that Woodruff, after his sale to Stone, was in the habit of being about the store, and rooming there. This was continued for awhile after the sale to Starkey, and after the service of the order of attachment in this case. In his examination on behalf of the plaintiff in error, Woodruff was asked whether Starkey objected to his being there, and answered that he did. To the question "What objection did he make, if any?" he answered, "If I can state just what he said—he said that it would let the cat out of the bag, or give the thing away, and that there would more parties attach."

This is all, and I think that, even if it were not contradicted, it falls far short of showing fraud in Starkey's purchase. If the phrase, "let the cat out of the bag," or "give the thing away" were really used, what was meant by it is merely conjectural. It is not at all clear that Woodruff himself knew what idea was intended to be conveyed by it, for on cross-examination on this point, he says:

Q. You say that Mr. Starkey objected to your being in the store?

A. Yes, sir.

Q. You say his objection was that it would let the cat out of the bag; what did he mean by that?

Objected to, and not answered.

Q. Do you know anything about what he meant by that?

A. I had an idea.

Q. You don't know; you had no conversation with him about it?

A. No.

Q. You know nothing further than that?

A. No.

But while Starkey admits he told Woodruff that he did not want him about the store, he denies that he made use of the words "let the cat out of the bag," or "give the thing away." And there being but these two witnesses as to what was said, the jury might well have concluded that no such language was used, especially so after Woodruff's admission that he had consented to give his testimony for the plaintiffs in error while in jail, under the promise "that Mr. Farrington would try and get him out." Starkey says, in his testimony on this subject, "I told him I didn't want him there because it would make people think he had an interest in there, and they would come upon me." That he had such apprehension of the tendency of Woodruff's presence in the store, and so stated to him, after learning by the levy of one attachment that he was really indebted, and that the goods were being treated by his creditors as still belonging to him, are not very remarkable, nor inconsistent with the utmost good faith on his part. And Starkey says further of Woodruff's reputed ownership, that about two days before he bought the goods he saw Woodruff at the store one evening, and said to him, "Frank, there is a good deal of talk around town about your having an interest in this store, and I want to know about it; and he says, 'Jake, I don't want any such talk, I have no interest in here.'" This inquiry was very natural, and, as I think, shows no fraud on his part. He saw Woodruff still about the store, and heard people suggesting

that he still had an interest in it, although Stone was the ostensible owner. Under these circumstances, being well acquainted with Woodruff, ordinary inquisitiveness, even if he had no thought of purchasing the goods, would doubtless have prompted the inquiry. Woodruff, however, assured him that he had no interest there, and he doubtless believed it. And even as to this supposed interest which Starkey had heard talked of, there is not a particle of evidence that he believed, or had any reason to believe it was fraudulent as to creditors, for, as before stated, it is not shown that he knew until after the attachment was levied, that Woodruff had any creditors.

After a careful consideration of the evidence, I am entirely satisfied that as to the defendant in error it is not sufficient to overcome the legal presumption of innocence to which he is entitled, and to beget a belief in a reasonable mind that, in making the purchase, he committed a fraud. At all events, it is clearly not such as will justify this court in saying that a jury of twelve men, sustained by the judgment of the trial judge, were manifestly wrong in finding it was not. Therefore the verdict should be sustained, and the judgment affirmed.

JOHN MCALISTER, PLAINTIFF IN ERROR, V. LANCASTER
COUNTY BANK ET AL., DEFENDANTS IN ERROR.

15	295
20	489
21	683
15	295
55	647

1. **Insane Defendants: GUARDIAN OF.** The general guardian of an insane defendant is authorized, and it is his duty when duly notified, to appear in court and defend for his ward.
2. **—: JURISDICTION: JUDGMENT.** A court, by the service of its summons, acquires jurisdiction of the person of an insane defendant; and the failure to appoint a guardian *ad litem* when the general guardian fails to appear and defend does not render the judgment either void or voidable. It is at most only erroneous, for which the appropriate remedy is by proceedings in error, and not by an original action to vacate the judgment.

ERROR to the district court for Lancaster county. Heard below before POUND, J.

Brown & Ryan Brothers, for plaintiff in error.

J. R. Webster, for defendant in error.

LAKE, CH. J.

This is a petition in error from Lancaster county. The object of the action in the court below was to have a judgment of foreclosure and conveyances of the mortgaged premises thereunder set aside and held for naught as to the plaintiff, who, at the time of the foreclosure proceedings, was the owner of the fee. The theory of the plaintiff's claim to this relief is, that the judgment in question is void for having been rendered on default and while he was under the disability of insanity.

The record shows that the plaintiff's disability, and that he was under guardianship, were known and observed in bringing the action. Accordingly, both he and his guardians were duly notified by the service of a summons upon them. But they made no appearance, nor was a guardian *ad litem* appointed, and in due time their defaults were entered, followed by a judgment of foreclosure in the usual form.

Counsel for the plaintiff seem to suppose that the rule respecting the jurisdiction of courts to render judgments against insane persons is the same as that which governs in the case of infant defendants; and that the court having proceeded without the appointment of a guardian *ad litem*, and an answer by him, the judgment, if not void, is at least voidable. If this were so, the plaintiff would probably be entitled to a cancellation of the judgment and of the sales made under it, upon just and equitable terms.

But in this supposition counsel labor under a mistake. The court by its process acquired jurisdiction of the plain-

tiff, and although the want of an answer by a guardian for the suit may have rendered the judgment erroneous, it is neither void nor voidable. Freeman on Judgments, 152. It was the duty of the general guardians of the plaintiff on being summoned to appear and defend their ward's interests. Sec. 32, ch. 34, Comp. Statutes. Having failed to do so, however, the court might have appointed a guardian specially for that suit, and required of him an answer putting in issue the allegations of the petition. Such, doubtless, would have been good practice, and perhaps the safer course. But whether the failure of the court to make such appointment and proceeding to judgment without an answer were even erroneous, it is not now proper to decide.

In this connection it may be well to observe that, in the case of minor defendants, it is expressly provided that defense "must be made by a guardian for the suit." Civil Code, § 38. In some states, as in Ohio for instance, there are similar provisions of statute respecting insane persons, but we have none here. In the case of *Sturges v. Longworth*, 1 Ohio State, 554, it was held to be the duty of the court, in the absence of such a statute, to appoint a guardian *ad litem* for insane defendants. And in *Johnson v. Pomeroy*, 31 Ohio State, 247, it was held, in effect, that although it was the duty of courts to appoint guardians *ad litem* for defendants shown to be insane, the failure to do so was only an irregularity, not in the least affecting their power to render binding judgments against them. No case has been brought to our notice which supports the theory of the plaintiff.

According to our view of the law on this subject, if there be any defect in the foreclosure judgment, it is not jurisdictional, but at most only such as may be corrected, and the plaintiff's rights fully secured, by proceedings in error, which in such case is the only remedy.

JUDGMENT AFFIRMED.

ALL of the judges concur.

JULIA A. GARLAND, APPELLANT, V. HENRY E. WELLS
ET AL., APPELLEES.

1. **Fraud: PRINCIPAL AND AGENT.** Evidence reviewed, and *Held*, That the principal had, as against an innocent purchaser, ratified the fraudulent act of her agent.
2. ———: ———. If the owner of land deliver to his agent a deed thereof, executed in blank as to the grantee, with express or implied authority to insert the name of a purchaser and perfect the conveyance, and the agent does so in good faith, the title will be conveyed.
3. ———: **INNOCENT PURCHASER.** And if, with such authority, the agent make a fraudulent use of the deed, as by inserting the name of a grantee and delivering it to him without consideration, for his own benefit, such grantee can convey a good title to an innocent purchaser.
4. ———. A purchaser with notice from a prior purchaser who was entitled to protection as a *bona fide* purchaser without notice, is himself entitled to protection against the previous equitable claim, which was invalid as against his grantor.

APPEAL from Lancaster county. Tried below before POUND, J.

S. J. Tuttle, for appellant.

W. H. Snelling, for appellees.

LAKE, CH. J.

This case comes here by appeal from the district court for Lancaster county dismissing the plaintiff's petition. The case was there heard on its merits.

The action was brought by Abigail D. Smith, now deceased (afterwards revived in name of Julia A. Garland), to have a chain of nominal conveyances of a tract of land from her to the defendant McMurtry set aside, and the legal title thereto confirmed in herself.

This relief was sought on the ground, as set out in the petition, that in the year 1872, said Smith then living in Quincy, Illinois, having intrusted the sale of the land to one Sherwood, as her agent, then a resident of Lincoln, sent to him a deed thereof in fee duly executed to a Mrs. Pooler, of St. Joseph, Mo., to whom Sherwood had by contract sold it. That instead of using the deed as intended, Sherwood fraudulently erased the name of Mrs. Pooler, the grantee, from said deed, and inserted in its place that of Margaret Andrews, his mother, and thus changed, had it entered of record in said county as her genuine deed.

That thereupon Sherwood caused Mrs. Andrews, who took the deed without consideration, to execute two mortgages on the land as security for his own prior obligations, which were afterwards foreclosed, and the title under the decree formally passed ultimately to McMurtry.

The theory of the petition is, that the deed from Mrs. Smith, because of said alteration, was absolutely void, and that the grantees under it took nothing thereby. And this doubtless would be true if the petition were sustained by the evidence. It is also alleged in the petition that McMurtry and those under whom he claims took the land with full knowledge of Mrs. Smith's right to it.

But McMurtry in his answer denies that Sherwood altered said deed, and alleges the fact to be that Mrs. Smith executed the deed in blank as to a grantee, and sent it in that condition to him with authority to insert the name of the purchaser, whoever he might be, and that he accordingly filled in the name of Mrs. Andrews, to whom he finally made the sale.

The finding of the court below on the issues being general, we do not know the precise ground of the judgment. Under the evidence, however, it might well, we think, have been that the defendants in the chain of conveyances, or some of them at least, were entitled to protection as innocent purchasers, no alteration of Mrs. Smith's deed having

been shown. Or it might have been that Mrs. Smith, knowing full well the use to which Sherwood had put her deed, had, by her long silence and failure to repudiate it, acquiesced therein, and was consequently estopped from complaining.

Looking to the evidence, we find that there is none to the effect that Sherwood changed the name of the grantee. Mrs. Smith herself says her "best impression is that there was no grantee named in the deed." This is really all the light given us on this particular branch of the case, except the circumstance of a total want of evidence to show an erasure of the grantee's name.

It is true that shortly after the deed was sent to Sherwood, Mrs. Smith was informed by letters from him that he had contracted to sell the land to Mrs. Pooler, and from this she was doubtless led to believe that the deed would go to her. But there is not a particle of evidence to show that, at the time the deed was executed, Mrs. Smith had ever heard of Mrs. Pooler, so it is impossible that she could have intended her as the grantee. Indeed it is reasonably certain, from all the facts and circumstances disclosed, that Mrs. Smith not only had no particular person in view, but, having full confidence in Sherwood's judgment and integrity, she left it entirely to him to select a purchaser, insert his name in the deed, and deliver it upon the terms, as to price and payment, she had given him.

That Mrs. Smith must have known of the use made of her deed very soon after its delivery to Mrs. Andrews, and some six years before she brought this action, is evident from at least one of the letters written by Sherwood to her, attached to her deposition. This letter was sent to her from Colorado in September, 1874, where Sherwood then lived. In it he says: "Dear Madam—Your favor of 1st inst. was duly received. Now if you knew the circumstances in which I was placed one year ago by the rascality of other parties, you would not think so bad of me. I will

say now, that I don't (or did not intend) to wrong you of one cent, and when the deed was transferred Mrs. Andrews expected the money from her brother without fail, but it did not come. Mrs. Andrews is as old as you are, and a member of the Methodist church. And for myself, if you or any one else can find a black spot in my character before the 1st day of July, 1873 (the deed was delivered to Mrs. Andrews on the 5th of that month), I am willing to go to the bottomless pit. Now, you shall have all of your money for your land in a very short time if I am let alone, as I am in the mining business and my lessees have just struck it rich. * * * * Now, please write to me how long you will wait for the whole amount, and if you will receive it in small amounts provided I cannot raise the whole amount at the same time. Now, if you publish our proceedings, or if it is known in this town, I cannot do anything for the support of my dear family or the liquidation of your debts. I am not the rascal you take me for, although you have reason to think so."

We have not the letter of Mrs. Smith to which this was an answer, nor her reply, if she made one. Mrs. Smith says much of the correspondence between them on this subject was destroyed. It is evident, however, from this letter that Mrs. Smith had censured him severely for the disposition he had made of her land, and was pressing him for payment of the price. It is pretty certain, too, that Mrs. Smith then, and for years afterward, as evidenced by her delay, looked only to Sherwood for the consideration of her deed. Otherwise, why did she permit the sale under the decree of foreclosure, and the subsequent conveyances, which it is now sought to have set aside, to be made without an effort to prevent them? Under this state of the proof, there can be no doubt that Mrs. Smith should be held to have ratified the delivery of the deed to Mrs. Andrews, even though she intended it for Mrs. Pooler, and that the plaintiff should now be estopped from questioning

its validity as to the defendants, who, it is clearly shown, invested their money on the faith of it.

And even aside from this delay and ratification, we think the plaintiff should fail. Mrs. Smith intrusted this deed to her agent with an implied authority, if not express, to insert the name of a grantee in blanks left for that purpose, and deliver it. The agent did so, and although he may have betrayed the confidence reposed in him, and doubtless did so by using the deed for his own benefit, thus rendering it clearly voidable as to Mrs. Andrews, it was good as to purchasers under her without knowledge of the fraud. And the deed was voidable as to Mrs. Andrews, not because of any want of authority in Sherwood to fill in the name of a real purchaser and deliver it thus perfected, but because of the fraud in delivering it without consideration, and for an evil purpose.

Although there is some conflict in the decisions, the current of the more modern of them plainly is to the effect, that if the owner of land deliver to his agent a deed thereof executed in blank as to the grantee, with authority, either express or implied, to insert the name of a purchaser and perfect the conveyance, and he does so in good faith, the title will be conveyed. *Drury v. Foster*, 2 Wall., 24. *Van Etta v. Evenson*, 28 Wis., 33 (9 Am. Repts., 486). *Schintz v. McMamy*, 33 Wis., 299. *Field v. Stagg*, 52 Mo., 534 (14 Am. Repts., 435). *Swartz v. Ballou*, 47 Ia., 188 (29 Am. Repts., 470). And it follows from this that if the agent with such authority, make a fraudulent use of the deed intrusted to him, as by inserting the name of a grantee and delivering it to him without consideration, and for his own benefit, such grantee can convey a good title to an innocent purchaser.

It is probably true that McMurtry was informed that Mrs. Smith still made some claim to the land when he bought it, or rather, before he had paid the whole of the consideration. But even this cannot prejudice him for the

 Scott v. McGuire.

reason that he derived his title through persons who were doubtless innocent purchasers. Neither Wood nor Geisinger had any notice whatever of Mrs. Smith's claim. McMurtry, therefore, is within the rule that "a purchaser with notice from a prior purchaser, who was entitled to protection as a *bona fide* purchaser without notice, is himself entitled to protection against the previous equitable claim, which was invalid as against his grantor." 3 Wait's Actions and Defenses, 474. For these reasons the judgment must be sustained.

JUDGMENT AFFIRMED.

THE other judges concur.

15	308
46	736

ALEXANDER SCOTT, APPELLANT, V. JOHN MCGUIRE ET AL., APPELLEES.

Removal of County Seat: INJUNCTION. There was an election on the question of re-location of a county seat, which resulted in favor of the proposition. An action was then brought to enjoin county officers from removing their offices, etc., to the place selected, on grounds which would have been available, if at all, in a contest of the election, under the statute. *Held*, That the action would not lie.

APPEAL from Wayne county. Heard below before BARNES, J.

Andrew Bevins, for appellant.

Britton & Northrop, for appellees.

LAKE, CH. J.

This is an appeal from Wayne county. The action was brought by the appellant to have the defendants—the board

of county commissioners—enjoined “from removing the county seat of said county, * * * or any of the county offices or county records or papers” from the town of LaPorte to the town of Wayne, “and from holding any meetings at the said town of Wayne, or any other place except at the said town of LaPorte,” etc.

It appears from the petition that an election had been called and held in said county on the question of the removal of the county seat from LaPorte to the town of Wayne. Although the result of that election is not definitely alleged, enough is stated to show, inferentially, that it was in favor of Wayne.

Several questions were discussed by the respective counsel, which would have been pertinent if this were a case of contest under the statute to have the declared result of the election vacated, but are wholly immaterial to this issue, and we shall not notice them except perhaps incidentally. This action is in no sense an election contest between these rival towns, as the parties litigant, the whole frame of the petition, and the prayer for relief plainly and most conclusively show. Such a contest, although it must, under the election law of March 1st, 1879 [Comp. Stat., Ch. 26], be brought in the district court, is essentially a legal remedy. The desired object in such a case is to have the declared result of the election vacated. This, however, cannot be reached by an order of injunction restraining county officers from removing their offices to the re-located county seat, and transacting business there, but by a judgment formally setting aside the result arrived at and declared by the canvassers of the votes cast at the election, in an action brought to contest it. Such an injunction would compel a violation by these officers of a positive command of the statute (Sec. 9, Art. III., Ch. 17, Comp. Stat.), that on the re-location of the county seat, they “forthwith remove their respective offices, and all county records, papers, and property in their offices or charge to the place where said county

seat shall have been re-located," a severe penalty being provided in case of a refusal to do so. This is a valid enactment which the courts have no right to disregard by requiring others to disobey it.

And now briefly of the grounds on which the injunction was asked. It matters not either that the officers in charge of the polls were not qualified, or neglected their duties; that illegal votes were cast; or that unfair and perhaps illegal influences were resorted to to induce the electors to favor the re-location. If all or any of these things on which the plaintiff relies were available at all, it was only by resorting to a contest under the statute, and not by way of a collateral attack in an action against the county commissioners.

In his attack upon the decision of this election, the plaintiff evidently mistook his remedy. He seems to have thought that the county commissioners had some power and discretion in the matter of removal after the result was announced, when in fact they had none whatever. After the call of the election to decide the question, they had no more to do with it than any other of the electors. They could simply vote upon the proposition; that was all.

It is very clear that the petition states no facts warranting an injunction against the removal of the offices, etc., to the new county seat, and that the demurrer was properly sustained.

JUDGMENT AFFIRMED.

THE other judges concur.

A motion for rehearing of this case was overruled.

15	306
17	490

AUGUST SCHOVERLING ET AL., APPELLANTS, V. JOHN
KOVAR ET. AL., APPELLEES.

Debtor and Creditor: SALE. A sale by one member of an insolvent firm of his individual property at a fair price, in payment of his antecedent personal indebtedness, without any secret trust or benefit reserved to himself, and by which a preference is given to such creditor over those of the firm, is opposed to no principle of law, and will be upheld.

APPEAL from Colfax county. Heard below before
GEORGE W. POST, J.

Phelps & Thomas, for appellants.

J. M. McFarland and Geer & Reeder, for appellees.

LAKE, CH. J.

This is an appeal from Colfax county. The action was brought by the appellants, who are judgment creditors of one John Shorney and the defendant John Kovar, as co-partners under the name of Shorney & Kovar, to have certain real estate subjected to the payment of their judgment. The land in controversy formerly belonged to Kovar, and was by him conveyed to the defendant Hahn but a few days before the recovery of the judgment. It is charged that this conveyance was fraudulent as to the creditors of said firm, and especially so as to the plaintiffs. But the court below found otherwise, and the question is brought here for review.

To this charge of fraud the defendants all oppose a general denial. In addition to this, the defendant Hahn answers that at the time of the conveyance Kovar, who is his son-in-law, was justly indebted to him in the sum of four hundred and fifty dollars, together with about ten dollars of interest accumulated thereon, in satisfaction of which he

took the land in good faith. To this point the evidence in the case is chiefly directed.

From a careful reading of the record we find that, although there are some little discrepancies and want of certainty in some of the testimony to the transaction, justly attributable, doubtless, to the fact that the witnesses had but a very imperfect understanding and use of the English language, in which they gave it, it is very clear as to Hahn at least, no fraud is shown, whatever may have been the design of Kovar in deeding the land.

It is shown by an abundance of testimony that early in the year 1881, on two occasions, Hahn loaned to Kovar, in all, four hundred and fifty dollars, for which, with interest at eight per cent, he was still indebted when the deed was made. It is also shown by the testimony of three or four witnesses, and is disputed by none, that when the money was obtained, and several times afterwards on his attention being called to it by Hahn, Kovar promised to give him security for the loan on this very land. For some reason, however, the matter was put off from time to time, and nothing done about it until after the firm of Shorney & Kovar had become embarrassed and unable to pay their debts, when, as "the shortest way," as Kovar says, "to satisfy the claim," it was arranged that Hahn should take the land in payment, and a deed was made accordingly.

We have looked in vain for evidence of bad faith on the part of Hahn in this transaction. Indeed it is exceedingly doubtful whether even as against Kovar a finding of fraudulent intent could be upheld. If the value of the land had exceeded and been greatly disproportionate to the amount due to Hahn, there would be reason for saying that, as to the excess, the design was to protect it for Kovar's use against the claims of his other creditors. But no such disproportion is shown. The amount really due to Hahn when he took the conveyance was, as the testimony shows, \$465, while the value of the land did not exceed \$500 at

most. Indeed, according to a decided preponderance of the evidence, the land was not worth more than \$450.

Of the persons who testified to its value, the defendants Hahn and Kovar placed it at from \$450 to \$500; and the witnesses Arnold and Dostil, who were disinterested, at just \$450. It is true that in his cross-examination Kovar seems to give assent to a much larger valuation, but the form of the question put to him, the present tense being used, seems to indicate that the value at the time of the trial, and not at the time of sale, which was a year before, was referred to. The valuation given by these witnesses seems to have been fair and satisfactory to the plaintiffs, for they produced no testimony against it.

We have here, then, as between these parties, clearly established, a sale by one member of an insolvent firm of his individual property, at a fair price, in payment of his antecedent personal indebtedness, without any secret trust or benefit reserved to himself, and by which a preference is given to such creditor over those of the firm. This the debtor had a right to do. Such a disposition of property is opposed to no principle of law, and will be upheld. *Crawford v. Kirksey*, 55 Ala., 282 (28 Am. Repts., 704), and cases there cited. A debtor who is unable to pay all his debts has an undoubted right to apply his means to the payment of such of them as he sees fit, except as restricted by our present assignment law [Compiled Statutes, 1883, p. 812], which is not here involved. There is nothing in the record which calls for correction, and the judgment will be affirmed.

JUDGMENT AFFIRMED.

ALL of the judges concur.

HOMAN J. WALSH, PLAINTIFF IN ERROR, V. SARAH
ROGERS, DEFENDANT IN ERROR.

15	309
18	283
15	309
27	564
15	309
140	904
15	309
64	101

1. **County Warrants:** VOID. Warrants issued by county commissioners for a purpose not within their jurisdiction are void, and do not bind the county.
2. ———: **PURCHASE OF.** Where one purchases what purports and is supposed to be the genuine warrants of a county, but which are void because issued without authority, the purchaser, upon discovering their true character, may at once rescind the contract of purchase, and recover the price paid for them.
3. ———. And in order to recover from the seller the price paid for them, it is not necessary for the purchaser to first seek their payment from the county.

ERROR to the district court for Lancaster county. Tried below before POUND, J. The case came before this court in 1881, being reported, 12 Neb., 28. After reversal here, and the making up of issues below, the plaintiff Rogers recovered judgment for the amount sued, and defendant Walsh brought the case up on a petition in error.

Mason & Whedon, for plaintiff in error, cited: Chitty on Bills, § 247, and cases cited. *Lambert v. Heath*, 15 M. & W., 486. *Osborn v. Nicholson*, 13 Wall., 659. *Boyce v. Table*, 18 Id., 548. *Otis v. Cullom*, 2 Otto, 427. *Baxter v. Duren*, 29 Me., 440. *Fisher v. Pierman*, 12 Ind., 497. *Ferm v. Harrison*, 3 Tenn. R., 759. *Bank of England v. Newman*, 1 Lord Raymond, 442.

Walter J. Lamb, for defendant in error, cited in his former brief: 12 Neb., 28. 2 Wharton Contracts, 745. *Wood v. Sheldon*, 42 New Jersey Law, 423. *Dumont v. Williams*, 18 Ohio State, 519. *Tyler v. Bailey*, 71 Ill., 34. Story Contracts, § 605. Burrough's Public Securities, 512. *Allison's Case*, 9 Ch. App., 24.

LAKE, CH. J.

The main question presented in this record was considered in *Rogers v. Walsh & Putnam*, 12 Neb., 28, when the case was before us on a demurrer to the petition. We then held that, on the facts stated, the pretended warrants were not a good consideration for the money paid for them, and that the plaintiff could recover it.

Adhering as we still do to the views expressed in the opinion there given, it is hardly necessary nor would it be profitable to go over again the ground then occupied. All that seems necessary is to ascertain whether, in the progress of the case, anything has been disclosed to make the principle of that decision now inapplicable.

Turning to the answer, we find that in addition to a general denial of the allegations of the petition the matters relied on as a defense are, substantially, that the plaintiff "knew all the facts in relation to said warrants," relied on her own judgment in making the purchase, and "expressly understood and agreed that she took the said warrants or pieces of paper at her own risk as to validity and value." These averments were denied by the reply, and there is no evidence to support them. Even Walsh himself, who testified, does not pretend that Mrs. Rogers agreed to take the paper at her own risk. Both parties to the transaction evidently supposed they were dealing with county warrants—genuine obligations—and so far as appears nothing was done to relieve Walsh & Putnam from the implied warranty of a seller of such paper, that it is in fact just what it purports to be. This paper was not what it purported to be. It was a nullity. In making it the county commissioners were outside of their jurisdiction entirely. Therefore the claim of counsel, that Mrs. Rogers should not be permitted to resort to Walsh & Putnam because she had failed to call upon the county for payment, is untenable. In this connection it is suggested that if the warrants

Walsh v. Rogers.

had been presented to the county treasurer he might possibly have paid them. But this bare possibility imposed no duty on Mrs. Rogers. She was no more required to first resort to the county for the payment of these warrants before seeking a return of the consideration paid for them, than would be the purchaser of a forged promissory note to look to the nominal maker before resorting to the seller for the recovery of the price paid for it. These instruments, although purporting to be the warrants of York county, in fact were not. So far as concerned the county they were void and as worthless as blank paper. Immediately upon discovering the spurious, worthless character of what she had been given for her money, Mrs. Rogers had the right to rescind the contract and recover the price paid.

The argument of counsel for the plaintiff in error proceeds on a false premise. It assumes that in issuing these warrants, the commissioners had jurisdiction to do so, although they may have acted unwisely, and perhaps illegally. It is, however, a firmly established rule of this court, that county commissioners have only such powers as are expressly granted, or are essential to their due exercise. *Hamlin v. Meadville*, 6 Neb., 227, and cases there cited. Every act of these officers not falling within this rule is void, and although it may possibly have the effect to render them personally liable for any injury thereby done, is no more binding on the county than it would be if they were merely private individuals. Anything done outside of their jurisdiction cannot properly be said to be the act of the county. It is clear that the court below has kept within the rule of our former decision on the demurrer to the petition, and the judgment must be affirmed.

JUDGMENT AFFIRMED

THE other judges concur.

15	312
17	244
20	490
23	810
15	312
46	742
15	312
47	800

HENRY GREBE, PLAINTIFF IN ERROR, V. RYLAND
JONES AND OTHERS, DEFENDANTS IN ERROR.

1. **Attachment: AFFIDAVIT.** An affidavit for an attachment that states in effect a claim for which an attachment will lie; that it is just; the amount which the affiant believes the plaintiff ought to recover; and one or more of the grounds for an attachment, need not in addition state that the defendant has property within the jurisdiction of the court subject to attachment.
2. ———: **UNDERTAKING.** Where the ground of the attachment is that the defendant is a non-resident, no undertaking is required.
3. ———: **RETURN ON WRIT.** Where the return on the writ of attachment shows a levy upon the property, the calling of appraisers, the appraisement of the property, etc., and states that the appraisement is returned herewith but fails to describe the property levied upon, such description being fully stated in the appraisement, *Held*, That after judgment the return is sufficiently certain.
4. **An Affidavit for Publication** which states that service of summons cannot be made within the state on the defendant to be served by publication, and facts bringing the case within section 77 of the code, is sufficient without referring to that section.
5. **Publication: NOTICE: DESCRIPTION OF PROPERTY.** Where the description of attached property in a notice by publication includes the property attached, it is not void, although the description be in general terms.

ERROR to the district court for Douglas county. Tried below before Neville J.

Manderson & Congdon, Clarkson & Hunt, and James W. Savage, for plaintiff in error, cited: *Morris v. Trustees*, 15 Ill., 266. *Cooper v. Reynolds*, 10 Wall., 308. *Davenport v. Lacon*, 17 Conn., 278. *Williams v. Stewart*, 3 Wis., 777. *Freeman on Judgts.*, § 126. *Drake on Attach.*, §§ 447, 448. *Crowell v. Johnson*, 2 Neb., 146. *Lessee of Mitchell v. Eyster*, 7 Ohio, 257. *Lessee of Parker v. Miller*, 9 Ohio, 113. *More v. Thayer*, 10 Barb.,

258. *Lessee of Adams v. Jeffries*, 12 Ohio, 272. *Voorhees v. Bank of U. S.*, 10 Peters, 449.

G. W. Shields and *J. C. Cowin*, for defendant in error Pier, cited: Civil Code, §§ 198, 199, 200, 211. *McGavock v. Pollock*, 13 Neb., 535. Freeman on Judgments, 527. Wade on Notice, 1035, 1087. *Atkins v. Atkins*, 9 Neb., 199. *Blair v. West Point Mfg. Co.*, 7 Neb., 152. *Claypool v. Houston*, 12 Kan., 324. *Moses v. McKim*, 2 Western Law Monthly, 15. *Lawler v. Whetts*, 1 Handy, 39. *Thatcher v. Powell*, 6 Wheat., 119. *Wescott v. Archer*, 12 Neb., 347.

MAXWELL, J.

On the 30th day of November, 1872, the plaintiff recovered a judgment against the defendants in the district court of Douglas county for the sum of \$1,083.26 and costs. The action was brought upon a joint obligation, and the defendants being non-residents of the state, an attachment was levied upon lands in Douglas county belonging to Pier, and service was had by publication. In December, 1882, Pier filed a motion in said court to set aside the judgment for want of jurisdiction in the court rendering it. The motion was sustained, to which the plaintiff excepted, and now assigns the ruling on the motion for error.

The first objection to the validity of the judgment is that the affidavit for the attachment is fatally defective in not stating that the defendants had property in this state subject to attachment.

Sec. 199 of the Code provides that an affidavit for an attachment may be made by the plaintiff, his agent, or attorney, showing the nature of the plaintiff's claim; that it is just; the amount which the affiant believes the plaintiff ought to recover; and some one of the grounds for an attachment enumerated in section 198.

The affidavit for an attachment complies with these requirements and is sufficient. It is unnecessary that it should contain a statement that the defendant has property in the state.

Second. That no bond was filed. One of the grounds for the attachment against Pier was that he was a non-resident of the state, and this under our statute is a ground of attachment, no bond being required.

Third. That the return does not describe the property. The return, among other things, contains the following statement: "Received this writ June 18th, 1872, and on the next day I went to the places where the within named defendant Pier's property was, and there in presence of F. X. Dillon and P. H. Reed, two residents of said county, I did declare that by virtue of this writ, I attached said property at the suit of Henry Grebe, sheriff, and then and there, together with said residents, who were first duly sworn, I made a true and impartial appraisement of the property attached, and said appraisement duly signed is herewith returned," etc.

The appraisement contains a full description of the property attached, and the return shows beyond question that the property described therein was the property levied upon. And in our opinion the description is sufficient. But even if it was not, the court, in furtherance of justice, even now would permit the return to be amended to conform to the facts. Such amendment, however, is unnecessary.

Fourth. It is urged that the affidavit was fatally defective for the reason that: 1, It fails to show that Pier was a non-resident of this state; 2, Because it fails to show that Grebe had a good cause of action against Pier; and 3, because it does not appear therein that the cause is one of those mentioned in sec. 77 of the Code. The affidavit was made by the attorney for Grebe and it is alleged therein "that service of summons cannot be made in the above entitled cause upon either of the above named defendants, Ryland

Jones, William H. Pier, and Patrick J. McNamara, in this state, all of said defendants being non-residents," etc.; "that the said defendants have in this county and state property which has been attached in the above entitled action," etc. The affidavit, while not as specific as to description of property attached as is desirable, was sufficient to authorize the publication of notice.

It is unnecessary to state a cause of action in the affidavit against the party sought to be served by publication. All that the statute requires is the oath of the plaintiff, his agent or attorney, that service of summons cannot be made within this state on the defendant or defendants to be served by publication, and that the case is one of those mentioned in sec. 77—that is, that the defendant to be served by publication has property within the jurisdiction of the court, in which the plaintiff claims an interest either by attachment or otherwise. When these facts are made to appear, service may be had by publication. As sufficient appears in the affidavit to show these facts it is not void.

The *fifth* objection is that the notice does not contain a description of the property attached. The notice is as follows: "To Ryland Jones, William H. Pier, and Patrick J. McNamara, non-resident defendants. Take notice that Henry Grebe, sheriff of Douglas county, Nebraska, plaintiff, did on the 18th day of June, 1872, file in the district court of the state of Nebraska, in and for Douglas county, his petition praying judgment against you for the sum of \$985.22, and interest from Nov. 13th, 1871, and caused an attachment to be issued and levied upon your property in this state. Said action is brought upon an undertaking in replevin given in a certain action commenced in the above named court on the 12th day of April, 1870, by Ryland Jones against the above named plaintiff and signed by the above named defendants, in which said action judgment was rendered against the said Jones for the sum of \$934.14 principal, and \$51.08 costs.

You are required to answer said petition on or before October 28, 1872.

"T. W. T. RICHARDS,
"Attorney for Plaintiff."

In *Wescott v. Archer*, 12 Neb., 345, it was held that where an attachment is levied upon the property of a non-resident, and service of summons is not made upon him, the court possesses no power to render judgment against him and order a sale of his property to satisfy the same unless publication has been made as required by law, and that the notice should contain a description of the property attached. In the argument of that case it was strenuously contended by the attorneys for the defendant in error that no notice whatever was necessary; that the court by the levy of the attachment acquired jurisdiction, and without a hearing could condemn real estate, and transfer the latter from the actual owner to the purchaser under the attachment, citing in support thereof, *Paine v. Moreland*, 15 Ohio, 435. That notice of the pendency of an action against a non-resident, by which it is sought to divest him of his property and transfer it to another, must be given to him in some mode, there can be no doubt either upon principle or authority, and all that is said in *Wescott v. Archer* as to the necessity of such notice we fully adhere to. And it is good practice to describe the property attached; but if this is not done, but the defendant is notified that an action has been commenced in a court and county named, to recover judgment for a specified amount against him, and that his property has been attached in that action, it is pretty clear that the notice is not void. If the property attached is within the county where the action is pending, and the description in the notice, although general in its terms, includes the property in controversy, the notice is not void. In such case the description is sufficient to cover all the defendant's property in the county where the action is pending, and differs materially from a

case of misdescription. *Wescott v. Archer*, so far as it is in conflict herewith as to a specific description of the property attached, is overruled. We think the notice was sufficient to give the court jurisdiction. The judgment must therefore be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

COBB, J., concurs.

A motion for a re-hearing was overruled at the January term, 1884. COBB, CH. J. MAXWELL and REESE, J. J., concurring.

LAKE, CH. J., dissenting.

While I agree with my brethren, that the judgment of the court below should be reversed, and, substantially, with all that is said in the majority opinion on the first four propositions, I most respectfully dissent from what is said respecting the "fifth objection."

The struggle of the writer of that opinion to hold fast to a remnant of the pernicious rule announced in *Wescott v. Archer*, 12 Neb., 345, is lamentable and to be regretted, as that decision is founded neither on the philosophy of the code nor a correct principle of statutory construction. If, under our system of procedure, such an action as was there considered were commenced by an attachment of property, the rule clung to with so much tenacity would be reasonable. But such is not the case.

In this state all civil actions in the district courts are commenced by filing a petition, and the issuing and service of a summons on the defendant. And if personal service cannot be given, it may in certain actions be made by a publication of notice to the defendant, which serves the purpose of an ordinary summons. Code of Civil Procedure, §§ 62, 77. And such notice will be entirely conformable to the requirements of the statute if it contain a

"summary statement of the object and prayer of the petition, mention the court wherein it is filed, and notify the person or persons thus to be served, when they are required to answer."

Thus it is seen that all the statute requires of the notice in addition to the name of the court is, "the object and prayer of the petition." And what these are one would naturally suppose should be determined by reference to the petition itself. But who would expect to find in a petition for the recovery of a money judgment a statement that an order of attachment had been or would be issued and levied on a particular piece of property, or, indeed, on property generally, of the defendant.

Under our system of procedure an attachment, as a means of satisfying a judgment, is essentially a collateral proceeding, and being so, a defendant who is notified, either personally or constructively, of the commencement of the main action, has notice also, or rather is bound to take notice at his peril, of all steps subsequently taken therein, including the attachment of property.

Suppose for instance that A sues B for the recovery of a simple money judgment, both being residents of the same county. There is no thought then of an attachment of property in the action, for no cause therefor exists. After service of the summons upon him, and before any other step is taken in the case, B removes from the state and becomes a non-resident, which, under the statute, is a ground of attachment. Thereupon A, discovering that B has left property within the jurisdiction of the court, files an affidavit of B's non-residence, sues out an order of attachment, and has the property seized under it. Will it be contended in such case that B is entitled to a special notice, by publication or otherwise, of the attachment of his property to make it valid? And yet he has had no notice whatever of the attachment except such as followed from having been notified of the commencement of main action.

Suppose, again, that at the commencement of the action B was already a non-resident, and was served in the first instance by a notice having all the formality required in *Wescott v. Archer*, *supra*, of the attachment of a particular tract of land, to which, however, he pays no heed; afterwards, and before judgment, A discovers other attachable property belonging to B, which he causes to be seized under a second order in the same action; is a notice to B of this attachment essential to its validity? I say not, and yet it would be under the rule of the majority of the court in *Wescott v. Archer* and of the opinion in this case.

I have said that the rule of *Wescott v. Archer* is pernicious, and it is so, even as modified in the majority opinion in this case, in this, that it not only invalidates a practice of our courts which before that case was decided had prevailed to a greater or less degree of not including in the notice of publication a description of the property seized, either particular or general, but also tends to stir up strife and litigation respecting titles to property, supposed to have been settled by that practice, which not only had the approval of the undivided opinion of this court in *Crowell v. Johnson*, 2 Neb., 146, but of the supreme court of Ohio (*Paine v. Moreland*, 15 Ohio, 435), under a statute not essentially different from our own.

For these and many other reasons that might be given, I feel compelled to dissent from so much of the majority opinion as is above indicated.

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HOAGLAND BROTHERS AND OTHERS, APPELLEES, V. W.
F. WILSON AND WIFE, APPELLANTS.

Husband and Wife: CONVEYANCE: CREDITOR'S BILL. A conveyed land to B to secure a debt, and required him upon the payment thereof to convey to the wife of A. A thereupon contracted debts upon the faith that he was the owner of land. He paid the amount due B, and had the land conveyed to his (A's) wife, but the deed was not recorded until after the debts in question were contracted. A creditor's bill being filed to subject the land to the payment of the debts, it was *Held*, Liable.

APPEAL from the district court of Gage county. Heard below before DAVIDSON, J., on exceptions to report of W. R. Kelly, Esq., referee.

Lamb, Ricketts & Wilson, for appellants, contended that it is not enough to show that the conveyance was made without consideration and for the purpose of placing the property beyond the hazard of business; it must be further shown that the conveyance was made with the expectation of contracting debts, and at the same time intending never to pay them. *Lyman v. Cessford*, 15 Iowa, 229. Bump on Fraudulent Conveyances, 317. *Evans v. Lewis*, 30 O. S., 11. That if a husband converts his wife's separate property to his own use without her consent, this will be a good consideration for a transfer by him to her. Bump on Fraudulent Conveyances, 310. *Wiley v. Gray*, 36 Miss., 510. That the judgment of Hoagland Brothers was taken upon an account, which included items charged after the date of the conveyance, and they are therefore subsequent creditors. *Reed v. Woodman*, 4 Me., 400. *Usher v. Hazeltine*, Id., 471.

N. C. Abbott, for appellees, cited: *Weil v. Lankin*, 3, Neb., 284. *Jones v. Green*, 1 Wal., 331. *Case v. Phelps*, 39 N. Y., 164. *Wake v. Griffin*, 9 Neb., 47. Kelly on

Hoagland Bros. v. Wilson.

Contracts Married Women, 143, 137. *Wilcoxon v. Morgan*, 2 Col. T., 473. *Carpenter v. Carpenter*, 25 N. J. Eq. 194. *Aultman v. Obermeyer*, 6 Neb., 264.

MAXWELL, J.

The plaintiffs are judgment creditors of W. F. Wilson, and brought this action to subject certain real estate in the name of Anna M. Wilson, the wife of W. F. Wilson, to the payment of their debts. The cause was referred by consent to a referee, who found in favor of the plaintiffs. The report was confirmed by the court, and the defendants, Wilson and wife, appeal.

It appears from the record that Wilson, who was a contractor in Lincoln, bought lumber and material of Hoagland Brothers from time to time between the 24th of March, 1880, and March 21st, 1881, to the amount of \$613.99, upon which he had paid the sum of \$400.73. That he had bought of the Chicago Lumber Co. lumber and material to the amount of \$316.23, upon which he had paid the sum of \$101.18. Judgment was recovered against him for these balances, and executions having been returned unsatisfied, this action was commenced. The record shows that in March, 1880, the title to the land in controversy was in W. F. Wilson. A judgment having been recovered against him, an execution was issued thereon, which was levied on this land. To give him further time to pay the debt, the attorney for the execution creditor in that case took a conveyance of the land to himself as security for the amount of the judgment, and at Wilson's request made a bond to Mrs. Wilson to convey said land to her upon the payment of the judgment. *This* judgment was paid about the 1st of June, 1880, and a deed made to Mrs. Wilson for the real estate in question. This deed was not filed for record until January 30th, 1882, after all these debts had been contracted. There was no change in the possession of the land, Wilson continuing

to lease the same, and to collect the rents and profits thereof after as before the conveyance, and held himself out as owner.

The record also shows that in the year 1858 W. F. Wilson and Annie M. were married in Pennsylvania; that Annie M. received of her own estate about \$500, which W. F. reduced to possession; that in the year 1868 they removed to Nebraska; that in that year he purchased real estate in Johnson county and conveyed the same to his wife; that she afterwards exchanged this for land in Cuming county, which was afterwards traded for a team; that there was no contract between Wilson and wife that he should repay her the money received by him from her estate until the year 1880, when he informed her that he would convey the land in controversy to her. If we consider this as a *bona fide* attempt on the part of the husband to pay a just debt to his wife, still the equities of the creditors are superior to hers. She is not a *bona fide* purchaser, and paid no new consideration to obtain the title, while she permitted it to remain apparently as the property of her husband, thereby enabling him to obtain credit upon the belief that he was the owner of the land. The case is substantially the same as *Roy v. McPherson*, 11 Neb., 197. But it is pretty clear from the testimony, that the object of the transfer to his wife was to hinder if not defraud creditors.

The property still belonged to the husband, although placed in the name of the wife. That such property is liable for the debts of the real owner will not be questioned. It is unnecessary to note in detail the objections to the finding of the referee, as it is clear that they are right, and that justice has been done. The judgment must therefore be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

CATHARINE REED, APPELLEE, V. SELDEN N. MER-
RIAM, APPELLANT.

1. **Taxes: TAX DEED.** The revenue law of 1869 provided that after the expiration of two years from the date of purchase, where lands were not redeemed, the treasurer *on production of the certificate of purchase* should execute a tax deed, etc.; and this certificate was to be canceled, and filed with the county clerk. *Held*, That the production of the certificate was a condition precedent to the authority of the treasurer to execute a deed, and that he had no power afterwards to execute deeds to correct errors in former tax deeds.
2. ———: ———: **SEAL:** The revenue law of 1879 requires the treasurer to attest the execution of a tax deed by his *seal*. *Held*, That a tax deed to be valid must be so attested.
3. ———: **LIEN OF PURCHASER.** Where a sale of land for taxes is invalid under the revenue law of 1869, the tax purchaser may enforce the tax lien for the amount of the taxes, and 12 per cent interest thereon.

APPEAL from Cass county. Heard below before
POUND, J.

Covell & Ransom, for appellant.

Chapman & Beeson, for appellee.

MAXWELL, J.

This is an action brought by the plaintiff against the defendant in the district court of Cass county, to have certain tax deeds of the defendant declared null and void, and to quiet the title of the plaintiff in the real estate described in the petition. Issues were joined and a trial had, in which the court found that the tax deeds in question were null and void, and a decree was entered setting them aside but allowing the defendant a lien on the lands in controversy for the taxes paid, with 12 per cent interest. The defendant appeals to this court.

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It appears from the record that the defendant purchased the lands in controversy in 1871 for the taxes due thereon in 1870. In 1873 he presented his certificate of purchase of said lands to the treasurer of Cass county for a tax deed, which he received and had recorded. This deed being so defective that it did not convey the title, the defendant, in March, 1874, applied to a subsequent treasurer of said county for a second deed to cure the defects in the first. A second deed was thereupon made by the then treasurer of said county, in which it is recited that it is made to cover omissions in the first. Neither of these deeds is attested by the county clerk *with the county seal*, and were invalid under the rule laid down in *Sutton v. Stone*, 4 Neb., 319.

In July, 1878, the defendant again applied to the then treasurer of Cass county for another deed for said lands, to correct former deeds, and a third deed was thereupon executed, which was duly attested by the county clerk with the county seal. Under this deed, which was recorded soon after its execution, the defendant claims the land in question.

Sec. 67 of the revenue law of 1869 provides that, "if no person shall redeem such lands within two years, at any time after the expiration thereof and on production of the *certificate of purchase*, the treasurer of the county in which the sale of such land took place shall execute to the purchaser, his heirs, or assigns, in the name of the state, a conveyance of the real estate so sold, subject, however, to all the claims which the state may have thereon for taxes, or other liens, or incumbrances."

Sec. 70 provides: "*When conveyances are delivered for lands sold for taxes the certificate thereof shall be canceled and filed away by the county clerk,*" etc. Gen. Stat., 923, 924.

The deed executed in 1878 shows on its face that no certificate was presented by the defendant to the treasurer for the purchase of said lands, but that the deed was exe-

cuted and recited therein to correct errors and omissions in former deeds.

The design of the revenue law of 1869 was, that at the expiration of two years from the date of purchase the holder of the certificate could present the same to the treasurer of the county and obtain a tax deed for the lands described therein which had not been redeemed. The certificate was then canceled and filed with the county clerk. Unless the certificate of purchase was presented to the county treasurer he had no authority whatever to execute a deed. This was a condition precedent to his right to exercise that authority; in other words, the law makes the return of the certificate the evidence upon which the treasurer has authority to act. There is no power to accept secondary evidence in lieu of the certificate, nor to execute deeds to *correct errors* in former deeds. The second and third deeds, therefore, being made without authority are null and void, and it being conceded that the first is invalid, the title to the real estate in question did not pass to the appellant.

The appellant also purchased the land in controversy for the taxes of 1879, and received a treasurer's deed therefor in November, 1881. This deed was duly signed by the treasurer of Cass county, but is not attested by his *seal*, as required by section 127 of the revenue law of 1879. Comp. Stat., ch. 77.

Whatever may have been the object of the legislature in requiring the treasurer to attest the execution of a tax deed by his seal, the provision is one that cannot be dispensed with, and the want of a seal is no valid excuse. A treasurer acts under a naked statutory power in executing a tax deed, and unless he comply with the provisions of the statute the deed will be void.

The tax deed being void, the statute gives the purchaser a lien upon the land for the taxes paid and interest thereon. This the defendant is entitled to. The question of the rate of interest allowed the tax purchaser has been before the

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Lepin v. Paine & Co.

court in several cases, and the invariable holding has been that where the sale was invalid the purchaser acquired merely the rights held by the county and was entitled to one per cent a month or 12 per cent per annum. *Pettit v. Black*, 8 Neb., 52. *Wilhelm v. Russell*, Id., 120. *Lynam v. Anderson*, 9 Id., 368, *Miller v. Hurford*, 11 Id., 377. As the sales were invalid the purchaser is entitled to 12 per cent interest, and this he was allowed in the court below. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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HERMINE LEPIN ET AL., APPELLANTS, v. C. N. PAINE
& CO., APPELLEES.

1. **Interest.** Under the provisions of the act of 1879 regulating the rate of interest, a judgment not founded on a contract for a higher rate will draw but seven per cent.
2. ———: **ACCOUNTS.** An account draws interest at the rate of seven per cent from six months from the date of the last item.

APPEAL from Adams county. Heard below before MORRIS, J.

Brown & Ryan Brothers, for appellants.

Batty & Ragan, for appellees.

MAXWELL, J.

This case was before the court in 1882, and is reported in 13 Neb., 521, the judgment of the court below as to Paine & Co. being reversed and remanded, with directions

to enter judgment in their favor for the amount of their claim, etc. The district court thereupon rendered judgment for the sum of \$1,480.11, and to foreclose the mechanic's lien on the premises in question in favor of Paine & Co. The plaintiff then filed a motion to correct the judgment by reducing the amount thereof to \$690; to compute the interest thereon at seven per cent; to tax the defendant with the cost of the proceedings; also that the judgment in favor of Scales be reduced to the extent of the amount of the judgment in favor of Paine & Co. The motion was overruled, and the plaintiff herein appeals.

1. As to the first point in the motion, we see no ground for reducing the judgment to \$690. The amount claimed in the cross-petition is \$1,142, with interest from the tenth day of December, 1879, and the proof sustains this claim except as to interest. The date of the last item in the account is Dec. 3d, 1879, and as under the statute the account would not commence to draw interest until six months from the date of the last item, there was error in computing it from the date of the account.

2. Sec. 3 of the act of 1879, regulating the rate of interest, provides that "interest on all decrees and judgments for the payment of money shall be from the date of the rendition thereof, at the rate of seven dollars upon each one hundred dollars annually until the same shall be paid, unless the judgment is founded upon a contract drawing a higher rate of interest, not exceeding ten per cent, when the judgment will draw the same rate as the contract." In other words, if there is no contract for a higher rate the judgment will draw seven per cent, and the same rule will apply to an account. As no contract for a higher rate is shown, Paine & Co. are entitled to but seven per cent interest, and the judgment will be modified to that extent. *State v. Scott*, 17 N. W. R., 263.

3. We can see no good reason why the costs in the action, except those made by Scales, should not be taxed to

the Lepins. They have contested the claim at every step, and it shows considerable assurance after being defeated to come in and seek to tax the costs to the successful party.

4. The Lepins are entitled as against Scales to set off the judgment in favor of Paine & Co. against the judgment recovered by Scales against them, and thus modified, the judgment of the court below is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

C. H. FITCH & Co., IMP., ETC., APPELLANT, v. J. D. MINSHALL ET AL., APPELLEES.

Judicial Sale: CONFIRMATION. A court in confirming a sale of real estate cannot make the confirmation conditional. Its authority is to confirm or set aside a sale, not to change or modify its terms.

APPEAL from Lancaster county, POUND, J., presiding.

J. E. Philpott, for appellant.

A. J. Sawyer, for appellees.

MAXWELL, J.

Executions were issued on certain judgments in this case and levied upon real estate, and a sale had thereunder. The plaintiff, Fitch & Co., filed a motion to set the sale aside, *first*, because the sale was unauthorized by the plaintiff; *second*, if the court should find the sale was authorized that the money be applied to the satisfaction of the judgment in favor of Fitch & Co. The sale was confirmed by the court and the sheriff ordered to make a deed to the

purchaser. The court, however, added to the order of confirmation this condition: "This order of confirmation is made conditional that it shall not take effect unless the purchaser of said land shall first pay into court the entire amount of the purchase money for which said sale was made, for the purpose of being applied in satisfaction of judgment liens, as may hereafter be ordered, and said sale is not to be confirmed and no sheriff's deed made until after said money is paid into court." To this conditional order the purchaser excepted. The return of the officer seems to show that the money was paid to him. It shows the amount realized from the sale, with the costs and expenses. In a sale upon execution the sheriff is the proper party to receive the money, and a purchaser who has paid to him cannot be compelled in addition to pay the money into court. The court has no authority to impose conditions in confirming a sale. If the purchaser has not paid the purchase price the sale should not be confirmed. The intention of the law is that the sale shall be complete. This includes payment of the price. The court is *then* to examine the proceedings and if satisfactory to confirm the sale, but a conditional confirmation is unauthorized by our statute. *Green v. State Bank*, 9 Neb., 165. *Ohio Life Ins. Co. v. Goodin*, 10 Ohio State, 557. *Benz v. Hines*, 3 Kan., 390. *Kinnear v. Lee*, 28 Md., 488. *Davis v. Stewart*, 4 Tex., 223. It follows that the order of confirmation must be reversed and set aside, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

LAKE, CH. J., concurs.

COBB, J., being of counsel, did not sit.

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GRANVILLE ENSIGN, PLAINTIFF IN ERROR, v. CHARLES
E. HARNEY, DEFENDANT IN ERROR.

Trial: MISCONDUCT OF ATTORNEY. On the adjournment of a trial from Saturday to Monday, two of the jurors in the case requested as a favor and obtained from an attorney of one of the parties, his horse and buggy to carry them home and return on the following Monday. A verdict having been returned in favor of the attorney's client, it was set aside and a new trial awarded.

ERROR to the district court for Lancaster county.
Tried below before POUND, J.

Lamb, Billingsley & Lamberston, for plaintiff in error.

O. P. Mason and L. C. Burr, for defendant in error.

MAXWELL, J.

The trial of this case was commenced in the district court of Lancaster county on the 1st day of June, 1883, and continued for several days. On Saturday, June 2d, about 4 o'clock P.M., the court adjourned until the following Monday. Two of the jurors thereupon applied to one of the defendant's attorneys for his horse and buggy to carry them home, a distance of about 12 miles, and return on the following Monday. The attorney readily complied with their request. A verdict having been rendered for the defendant, a motion for a new trial was filed, in which this cause among others was assigned as ground for a new trial. Affidavits were filed in support of the assignment, and facts stated therein were admitted; the only defense being that the transaction was open and above board, and not done with the intention of exercising an influence on the jurors, and in fact it did not have any influence upon them in making up their verdict. It is also said that one of the attorneys for the plaintiff in another case had loaned

his horse and buggy to a juror, and no complaint was made. We have only to deal with the case before us.

Jurors are chosen because they are supposed to be indifferent between the parties. At common law it was good cause for challenge that the juror had been an arbitrator on either side; that he had an interest in the cause; that there was an action depending between him and the party; that he had taken money for his verdict; that he had formerly been a juror in the same case; that he was the party, master, servant, counselor, steward, or attorney, etc. 3 Blacks. Com., 363-4. And the common law in that regard prevails in this state.

Unless fair-minded, unbiased jurors can be selected, a trial becomes a mere farce, dependent not upon the merits of the case, but upon extraneous circumstances, such as the bias, prejudice, or interest of the jury. To determine the competency of a juror, an oath is administered to him and he is required to answer all questions touching his qualifications as a juror, not generally, but in that particular case. Great latitude is allowed in such an examination, and if it appears probable that the juror is not indifferent between the parties, he is excluded. Where a juror is accepted as being impartial, he must remain so during the trial. To permit him to accept favors from either party is to put him under obligations to such party, the tendency of which is to bias his judgment. Nor is it material that such favors were not intended to influence the juror, as it can not be determined how far they may have had that effect; and such misconduct will vitiate the verdict.

In *Tomlinson v. Derby*, 14 Am. Law Reg., 543, one of the jurors during the progress of the trial expressed an opinion as to the merits of the case to persons who were not on the jury, and the verdict was set aside. The court say (page 544):

"One of the jurors impaneled to try the case, suffered a person, other than a juror, to say to him, substantially,

while the case was on trial, that if the trial should continue fifteen or twenty days, and the plaintiff should recover five thousand dollars damages, he would have nothing left after paying the expenses of the suit. The juror assented to the statement, and said substantially that he had learned from a party out of court during the trial what were the expenses of running the superior court, and expressed his opinion, derived from information thus obtained, that the costs of the trial would amount to the sum of five thousand dollars.

"The same juror made on another occasion, to another party not a juror, during the progress of the trial, substantially the same statement, that if the plaintiff should recover five thousand dollars there would be nothing left after paying the expenses of the case. The same juror had other conversations with other parties not of the jury, and during the progress of the trial, and to one of them he narrated the substance of the evidence as far as it had been given.

"Since the case of *Bennett v. Howard*, 3 Day, 219, the law of this state has been that where a juror has had conversation with a party not of the panel respecting the case on trial, it is sufficient cause to set aside the verdict, unless it appears that the successful party in the suit has not been benefited by the juror's misconduct, or the losing party injured. 1 Swift's Digest, 775. *State v. Watkins*, 9 Conn., 47. *Pettibone v. Phelps*, 13 Id., 445. *Hamilton v. Pease*, 38 Id., 115. The whole tendency of the misconduct in this case was to benefit the plaintiff and injure the defendant, and it is highly probable that it operated to enhance the amount of damages the plaintiff recovered."

The same may be said of the acts complained of in this case, and as the tendency was to benefit the prevailing party, the verdict must be set aside.

There are other errors assigned in the record to which it

Omaha Nat'l Bank v. Omaha.

is unnecessary to refer, as a new trial must be had. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

OMAHA NATIONAL BANK, PLAINTIFF IN ERROR, V. THE
CITY OF OMAHA, DEFENDANT IN ERROR.

Bonds: INTEREST. The proper authorities of the city of Omaha were duly authorized to issue \$100,000 bonds due in 20 years, with interest at *six* per cent, payable semi-annually. The bonds to be sold at not less than par. They issued bonds conforming in all respects to the authority, except the interest, which was *five* per cent. The bonds were sold above par. *Held*, The rate of interest being within the authority conferred, the bonds were valid.

ERROR to the district court for Douglas county. Heard below before WAKELEY, J.

Thurston & Hall, for plaintiff in error.

W. J. Connell, for defendant in error.

MAXWELL, J.

The proper city authorities of Omaha submitted to the electors of said city a proposition for the issue of \$100,000 bonds for the paving of the streets of said city, the bonds to run twenty years, to be sold at not less than par, and to draw interest at six per cent, payable semi-annually at Kountze Brothers' bank in the city of New York. The proposition was adopted, and the mayor and council hav-

ing ascertained that bonds at a less rate of interest than six per cent could be sold at their face value, issued said bonds with interest at five per cent, but conforming in all other respects to the proposition as adopted by the electors. These bonds were sold to the plaintiff for the sum of \$102,-041.67. Afterwards, a question having arisen as to the validity of the bonds by reason of the less rate of interest in the bond than in the proposition, the plaintiff sought to rescind the contract and recover the money paid, and brought an action in the district court of Douglas county for that purpose. A demurrer was sustained to the petition, and the plaintiff brings the cause into this court.

No question is raised as to the authority conferred upon the mayor and council when properly authorized by the electors of the city to issue bonds for the purpose indicated, and the only question for determination is, did the insertion of a *less* rate of interest in the bonds than was provided in the proposition affect their validity, the bonds at their reduced rate bringing more than their face value? The attorneys in the case have been unable to find any case bearing directly upon the question, and in our researches we have found none.

The general rule is, that all contracts made by municipal officers in excess of their powers are void, and this rule applies to municipal bonds. In the case under consideration, however, the power to issue bonds of the kind actually issued and sold was expressly conferred, except as to the interest; under that power bonds for a *greater* rate of interest than six per cent could not legally be issued, because the increased rate of interest would be in excess of the authority conferred. The officers issuing the bonds are public agents of the city and must act within the scope of their authority. This authority is in the nature of a power of attorney to issue bonds of a certain description in the name of the municipality to raise a definite sum for the use of the city for a specified purpose. The object was to raise

\$100,000. If this can be done for less interest than the agents were authorized to pay, the city is benefited to that extent and the diminished rate of interest is not *ultra vires*.

It is a fundamental principle of the law of agency that it is the duty of the agent to protect and advance the interests of his principal. This the proper authorities of the city of Omaha have done in this case, and their acts in issuing the bonds in question being within the scope of their authority the bonds are valid. The judgment therefore must be affirmed.

JUDGMENT AFFIRMED.

ALL of the judges concur.

THE NEW ENGLAND MORTGAGE SECURITY CO., PLAINTIFF IN ERROR, V. JONATHAN ADDISON ET AL., DEFENDANTS IN ERROR.

15	335
39	385

15	335
59	651

1. **Agency: USURY.** The question of agency is one of fact to be determined from the evidence in a case. Therefore where a correspondent of the C. Banking Co., who had advertised money to loan, in filling out an application for a loan, stated therein that the applicant employed him and the C. Banking Co. to negotiate a loan for him, *Held*, That the applicant was not estopped from showing that the correspondent was the agent of the C. Banking Co.
2. **Evidence examined, and *Held*,** Sufficient to sustain the report of the referee.

ERROR to the district court for Dixon county. Heard below before BARNES, J., on exceptions to report of referee.

Gannt & Norris (*D. G. Hull* with them), for plaintiff in error.

J. J. McAllister, for defendants in error.

MAXWELL, J.

This action was brought in the district court of Dixon county to foreclose a mortgage upon real estate, the defense being usury. The cause was referred to Hon. Isaac Powers, who, after hearing the evidence, found that while the note and mortgage were given for \$300, with ten per cent interest thereon, that the makers received but \$255, the remainder of the \$300 being retained for commission. The referee also found that Addison at various times had paid interest on said debt amounting in the aggregate to the sum of \$90. The report was confirmed and a decree of foreclosure rendered for the sum of \$120. The plaintiff appeals to this court.

A large amount of testimony was taken, the full record covering 190 pages. That \$45 out of the \$300 was retained, is undisputed; but the plaintiff claims that this sum was retained by Addison's agents, and that the case is clearly within that of *Philo v. Butterfield*, 3 Neb., 256. Both parties agree that the question of *agency* is the principal one for determination.

It appears from the testimony that the principal office of the plaintiff is in Boston, and that the Boston office of the Corbin Banking Company is in the same building, on the same floor, and adjoining that of the plaintiff. It also appears that the plaintiff corporation was organized for the purpose of loaning money as stated by Saltonstall "on mortgages on western farms, and it was no part of its business to loan money in any other way." How it proposed to reach western farmers without some means of communicating with them, and ascertaining the character of the security offered, does not appear. The testimony also shows that Mr. Corbin, of the Banking Company, is a stockholder in the Mortgage Security Co. It is apparent, too, that a very large proportion of the loans made by the plaintiff, were made through the Corbin Banking Co., the only other

parties named being a firm in Kansas City. This loan was made through Hon. J. B. Barnes, of Ponca, who testifies as follows: "I wrote to them (the Corbin Banking Co.) myself to know if I could procure any loans through them for parties wishing to obtain money, and I think Mr. Wakefield wrote a favorable word to them for me. In answer I got a letter from this Corbin Banking Company stating that I could act as their correspondent in this vicinity, and they sent me the blank contracts, etc., which I have before spoken of."

Q. Were you required to accompany this application which you sent into the Corbin Banking Company with a private letter to the company stating that the applicant for the loan was in good standing so far as honesty and punctuality were concerned, and the real condition of his lands?

A. No, sir, not a private letter. But as and a part of the application, I was required to give my opinion as to the desirability of the loan, and the standing of the applicant in regard to his being considered prompt in the payment of his debts and honest. * * * * I had to answer in effect each question before the loan could be approved.

Q. Then unless you approved of the applicant for the loan, they would not place it?

A. Yes, sir, that is a fact.

Q. Did you recommend Mr. Addison to them?

A. I did.

There is much more of Mr. Barnes' testimony to the same effect, which it is unnecessary to copy. He seems to have negotiated loans for the Corbin Banking Co., to the amount of about \$15,000.

F. W. Dunton, the cashier of the Corbin Banking Company, testifies that the notes and mortgages in question were prepared in the office of the Corbin Banking Co., and sent to Mr. Barnes to procure the signatures of the defendants and their acknowledgment to the mortgage, and to be returned to the Banking Co. The testimony also shows that

the blank applications for loans were furnished to Mr. Barnes by the Banking Co. This application required the applicant to state the condition of the premises, the amount of stock, buildings, and improvements, the amount of grain raised the previous year, the amount of the applicant's indebtedness, and the use to which he intended to apply the money borrowed, and required Barnes to give *his view* as to the desirability of the loan; that is, whether it would be a safe investment or not. It also appears that Barnes obtained and forwarded the abstract of title for the mortgaged premises, and did all other acts, so far as we can see, to protect the interests of the parties for whom he was acting as "correspondent."

That these services were rendered by Mr. Barnes for the Banking Co., we think the evidence clearly shows. A great deal of stress is laid by the plaintiff on the fact that Addison stated in his application that he employed Barnes and the Banking Co. as *his* agents to procure the loan, and it is intimated, although not directly alleged, that he is estopped from denying such agency. No grounds for an estoppel are shown, and the question of agency, like any other fact, must be determined from the evidence. And in our opinion the report of the referee is sustained by the clear weight of the testimony, and the decision confirming the report must be affirmed. It is apparent that there is an error in the amount of the decree and that the plaintiff is entitled to \$45 more than was awarded in the court below, viz., the sum of \$165, and a decree will be entered in this court for that sum.

JUDGMENT ACCORDINGLY.

THE other judges concur.

ROBERT J. DOOM AND HANS P. LAU, PLAINTIFFS IN ERROR, v. A. L. A. WALKER, DEFENDANT IN ERROR.

15	339
42	727
15	339
50	778

Verdict. When, under the provisions of section 293 of the code of civil procedure, the court shall have instructed the jury that if they render a general verdict to find upon particular questions of fact stating the same in writing, and directing a written finding thereon, the jury shall fail to agree to a finding upon the whole or a part of such questions, but shall find a general verdict, it is error on the part of said court—over the objection of the defendant, against whom is the said general verdict, to receive such verdict, and judgment thereon will be reversed.

ERROR to the district court for Saunders county. Tried below before GEORGE W. POST, J.

Harwood & Ames and *Burr & Kelly*, for plaintiffs in error.

M. H. Sessions, for defendant in error.

COBB, J.

There is a question of practice raised in this case which has not been previously presented to this court. This question may be stated as follows: When, under the provisions of section 293 of the code of civil procedure, the court may instruct the jury, if they render a general verdict to find upon particular questions of fact, stating the same in writing, and directing a written finding thereon, the jury shall fail to agree to a finding upon the whole or a part of such questions, but shall find a general verdict, is it error on the part of said court, over the objection of the defendant, against whom is the said general finding, to receive such verdict, enter judgment thereon, and discharge the jury?

A statement of the case somewhat at length is necessary to the proper application of the above question. The ac-

tion was in the nature of trespass for entering the store of the plaintiff and taking away and converting his goods. The defense of the defendants, one of whom is a constable was: 1, a general denial; 2, a justification under a writ of attachment, then in the hands of the defendant, Robert J. Doom, as constable of said county, issued by a justice of the peace, at the suit of the defendant, Hans P. Lau and partner, and against one W. E. Edwards; and 3, that the said goods were the property of the said Edwards, and not of the plaintiff, etc.

Upon the trial the controversy was almost exclusively confined to the question, as to whether there was a perfected purchase by the plaintiff Walker from W. E. Edwards of the goods in question, before the levy of the attachment, or not. According to the testimony of Walker—plaintiff below, who was a witness on his own behalf, on Wednesday, October 12, 1881, W. E. Edwards was the owner of and in possession of the goods which constituted the furniture and supplies of his restaurant, which he was engaged in keeping in the house in which he also lived with his wife and four children at Ashland. I quote at some length his testimony.

“In the first place I asked him if he wanted to sell, and he said he did. And I told him what I was doing, and I asked him in the first place, how he would sell. And he said he would sell and take an inventory; and then I told him that he had some goods in there that I did not want, as I could not pay for them. And that I did not want to go in debt too heavy. These consisted of heavy groceries, he had in there, and we agreed that I was to give him \$350 cash and a mortgage on the fixtures in the house, and also on a mower and hay rake that I had in Cass county, that I had before I came here, and it was to be completed in that way if I could get the building. If I could not get the building he was not to sell, and I was to go out and see Mrs. Lyman, I went out and saw her and she was to tell

me on Thursday, whether I could get the building or not, but she did not send me in word and on Friday morning I went out to see her, and she told me I could have the building, by him paying up the remainder of the rent that was due on the building for that month up to November first, and then if I would deposit the \$22 in the bank for November, I could have the building as long as I kept the rent paid up in advance. And then I came in and told Mr. Edwards so, and said he, 'All right,' and then he said, 'I have not got the money by me to go and pay up the rent,' and I said, 'All right I will hand it to you,' and I handed him \$10. I handed it to him in Scott's. Scott receipted it and I handed him back the remainder, something like between \$7 and \$8—\$10—I don't remember exactly, but he handed me some change back."

Q. State what was agreed upon at that time, if anything, about the time that the invoice should be made, and who was to make it?

A. We selected the parties. He chose Luther Snell, and I took George Patton. At that time and then we took an invoice of those goods on Monday, and I was to take possession, and I was to have one room vacated so I could move in.

Q. State what was said and done?

A. We were to take the invoice on Monday, and I was to have possession so as to move right in.

Q. Give the language of what was said. What was said by you and the other party?

A. He said, 'All right, we will take an invoice of the goods on Monday.' I came to town Monday morning and he was not there, but the building was vacated. That is, one room for my family. On Monday morning I came in, in person on Monday morning, and my family came in on Tuesday.

Q. Where did your family go?

A. They went into the building.

- Q. On what day did you take possession?
- A. On the 18th, in the front room up stairs, we moved in.
- Q. State what further was done? (No answer.)
- Q. State if the invoice was made that day?
- A. No, sir, it was not.
- Q. When was it made?
- A. On the 22d of October.
- Q. Was Edwards a married man?
- A. I should judge he was. I don't know, I suppose he was though.
- Q. Did he have a wife there in the building?
- A. Yes, sir, and four children.
- Q. Where was the wife at the time?
- A. She was in the building.
- Q. Where was she living with her family?
- A. At the time the invoice was taken, or before?
- Q. Yes, and all this time?
- A. In the house.
- Q. In the same building?
- A. Yes, sir.
- Q. Now state what was done on the 22d, and who did it?
- A. We took an invoice of the stock.
- Q. Who did?
- A. Luther Snell, George Patton, and myself.
- Q. Where was Mrs. Edwards?
- A. She was up stairs.
- Q. Well, what did she do about it?
- Defendant objects as immaterial. Sustained.
- Q. Was she not there in possession, and running the business of the restaurant?
- A. Yes, sir.
- Q. State whether she was running that restaurant?
- Defendant objects as immaterial. Overruled.
- A. Mrs. Edwards was running the restaurant at that time?

Q. I am calling your attention particularly to the 17th, and down to the 22d, when the inventory was made, whether she was running that restaurant?

A. Yes, sir, she was.

Q. What was done on the 22d, and who did it?

Defendant objects as immaterial and irrelevant. Sustained.

Q. I want to know, first if on the 22d, that arrangement that you had made with Mr. Edwards was perfected and carried out according to the terms and the agreement of the same.

Defendant objects as leading and irrelevant. Sustained.

Q. State what was done under that contract?

A. It was carried out to the letter.

Defendant objects as incompetent. Sustained.

Q. State what was done?

A. The invoice was taken and the money was paid over.

Q. Who took it?

A. Luther Snell, George Patton, and myself.

Q. Well, what did Mrs. Edwards do about it?

Defendant objects as immaterial. Sustained.

Q. State if you know whether Mrs. Edwards knew what the contract was between you and Mr. Edwards?

A. Yes, sir.

Defendant objects as hearsay and incompetent, and moves the court to strike out the answer. Overruled and defendant excepts.

Q. Now go on and state who was present at that time, and who acted for Mr. Edwards, if anybody; in making that invoice?

Defendant objects as incompetent. Sustained.

Q. State whether you deposited \$22 in the bank for the November rent?

A. I did.

Q. State what was done there that night in making the invoice?

A. We simply took the invoice, and I paid over my money according to the contract entered into between Mr. Edwards and myself.

Q. State how much goods you invoiced and how much you invoiced them at?

Defendant objects as immaterial and irrelevant. Overruled and defendant excepts.

A. I purchased \$676.10 worth, if I remember right, and I think I paid \$350 cash.

Q. When did you pay that.

A. Saturday night.

Q. Who did you pay it to?

A. To Mrs. Edwards.

The testimony of this party as a witness continues at considerable length, but the only new facts elicited deemed important for the purposes of this opinion are, that in addition to the payment of \$350, as testified to above, he also executed and delivered to Mrs. Hattie E. Edwards, Mr. Edwards' wife, a note at six months from that date for the sum of \$325, and also a chattel mortgage to secure the payment of the same on the fixtures in the building and some farm implements of plaintiff's in Cass county.

Also that he, plaintiff below, took possession of the goods Saturday night, the twenty-second of October, and was in possession of them on Monday morning, the 24th, when the defendant, Doom, the constable, took them on the attachment in favor of Lau & Co.

The deposition of Mrs. Harriet E. Edwards, taken on the part of defendants, was read in evidence on their behalf. Her testimony in the main corroborates that of the plaintiff in reference to the understanding between Walker and Edwards previous to the latter going away, the taking of the invoice, the payment of the \$350, and the giving of the note and mortgage to her. Also that her husband left Ashland the morning of the seventeenth of October, 1881, that he did not bid her good-by when he left, that she did

not know where he was going, and that at the time of the taking of the invoice and payment of the money to her by Walker she thought that Edwards, her husband, had finally abandoned his family or had been killed. Also that he had never authorized her to consummate the sale of said goods to Walker, that she did not know whether Walker was aware of that fact or not. But in answer to the question whether there was not a conversation between herself and Walker to that effect, she answered, "I don't know but there was such a conversation." She further stated that at the time that Edwards left Ashland he was the owner of the goods in question.

Witness further stated that after Edwards left Ashland it was about four weeks before she heard from him, at which time he came to Augusta, Ills., where witness then was.

The deposition of William E. Edwards, taken on the part of defendants, was also read in evidence in their behalf. This witness also in the main corroborates the testimony of Walker as to the preliminaries of the agreement to sell the property by him to Walker, the obtaining by Walker of the agreement to rent him the house by the Ly-mans, and the payment by Walker of the amount of arrears of rent for a part of the month of October; but that he left Ashland on the morning of October without consummating the sale; that he never consummated it or delivered the goods to Walker; that he never authorized Mrs. Edwards or any one else to consummate the sale nor to sell the goods, except to his clerk to sell at retail in the usual course of business; that when he left Ashland, October 17, 1881, he was the owner of and in the possession of the goods. He also testified that when he left it was not with the intention of abandoning his family; that he told two persons, whom he names, on that morning that he was going to Omaha, and return that evening; that he was absent from Ashland four weeks less one day; that when he re-

turned he found that his wife and children had gone and had sold the property; that his wife had sold it; that he remained at Ashland but a few hours, and went to Illinois, where he found his wife at her sister's; that since then he and his wife had lived together in Illinois, and also in Missouri; and that he had never ratified or consented to the sale of the said goods.

There was other testimony, but which it is not deemed important to notice, on this point.

After delivering its charge to the jury, the court delivered and submitted to them for their special finding the following questions:

1. "Did W. E. Edwards, late of this county, whose deposition has been read herein, on or before the twenty-fourth day of October, 1881, or at any other time, personally deliver to the plaintiff, Walker, the goods and chattels in controversy, or any of them?"

To which the said jury answered, "No."

2. "Did the said W. E. Edwards, at any time on or previous to said twenty-fourth day of October, 1881, in any way instruct or direct his wife or give her his consent or permission to sell or deliver the goods and chattels in controversy, or any of them, to the plaintiff Walker?"

To which the jury answered, "Fail to agree."

3. "Did the said W. E. Edwards, at any time before meeting his wife in Illinois, in November, 1881, consent to or acquiesce in a sale or delivery by her to said Walker of the goods and chattels in controversy, or any of them?"

To which the jury answered, "Yes."

4. "Did the plaintiff Walker, at any time, pay or give to said W. E. Edwards, personally, any money, note, or valuable thing as or for the whole or any part of the purchase price of the goods and chattels in controversy, or any part thereof? If so, when and how much?"

To which the jury answered, "Failed to agree."

5. "Did the said W. E. Edwards, at any time before

the twenty-fourth day of October, 1881, in any way direct or instruct his wife or give her his consent or permission to consummate or close up a sale or delivery of the goods and chattels in controversy to the plaintiff Walker previously negotiated between said Edwards and said Walker?"

To which the jury answered, "Failed to agree."

At the same time the said jury brought in a general verdict in favor of the plaintiff for the sum of three hundred and ninety-four dollars and ninety cents. Whereupon the defendants, by their counsel, objected there in open court to the reception or recording of said general verdict herein, on the ground that said jury had failed to make, render, or return any verdict or findings in response to the special questions or findings submitted to them by the court, numbered respectively two, four, and five, or either of them. Which objection the court then and there overruled, and received the said general verdict and ordered the same to be made of record, and discharged said jury from the further consideration of said cause. To each of which said rulings and orders the said defendants then and there excepted. Thereupon the said defendants filed their motion for a new trial, which was overruled, exception taken by the said defendants, and judgment rendered on the verdict.

The provision of the statute applicable to the question here presented is in the following words:

"Sec. 293. In every action for the recovery of money only or specific real property, the jury in their discretion may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict in writing upon all or any of the issues; and in all cases may instruct them if they render a general verdict to find upon particular questions of fact to be stated in writing, and may direct a written finding thereon."

We are cited to no case by counsel on either side exactly in point, nor have I, in the limited time at my command, been able to find one. Indeed I doubt that any case can

be found where a court, having directed special findings on a number of propositions by a jury, has accepted a general verdict at their hands without a response to all of them, much less where they have left a majority of such propositions unresponded to.

A trial court should be careful not to submit trivial or irrelevant propositions for the findings of a jury. Such as it does submit become a part of the record, which both court and jury are bound to respect as such, not to be ignored by the one or waived or withdrawn by the other, certainly not without the consent of the parties to the suit.

It is not to be inferred from the above that the propositions submitted in the case at bar are considered either frivolous or irrelevant. On the contrary, I think their submission was altogether proper and called for by the state of the testimony, and that their answer was necessary to a proper solution of the case.

There is another important question presented in the case, but having reached the conclusion, upon the point above considered, that there must be a new trial, such other question will not be examined.

The judgment of the district court is reversed, and the cause remanded for further proceedings in accordance with law. By the court,

JUDGMENT REVERSED.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1884.

PRESENT:
HON. AMASA COBB, CHIEF JUSTICE.
" SAMUEL MAXWELL, } JUDGES.
" M. B. REESE, }

JAMES SWEET, PLAINTIFF, V. WILLIAM R. CRAIG, ROW-
ENA S. CRAIG, HIS WIFE, WILLIAM M. CRAIG, LUCY
CRAIG HIS WIFE, NATHAN B. CRAIG, GEORGE L.
WOOLSEY, ARTHUR T. CRAIG, AND STATE NATIONAL
BANK OF LINCOLN, DEFENDANTS.

15	349
57	180

Creditor's Bill. Upon the pleading and proofs in this case, *Held*,
That the judgment of the district court in favor of the defend-
ants, Rowena S. Craig, Nathan B. Craig, Arthur T. Craig, and the
State National Bank of Lincoln be affirmed. And that said
judgment, so far as the same is in favor of the said plaintiff and
against the said William R. Craig and Lucy Craig, be reversed,
and a judgment entered in this court in favor of the said plain-
tiff, giving him such relief as the evidence will sustain.

APPEAL and cross appeal from Lancaster county.
Heard below before POUND, J.

Covell & Ransom, for plaintiff.

Watson & Wodehouse and O. P. Mason, for defendants.

COBB, CH. J.

This was an action in the nature of a creditor's bill, brought by James Sweet against William R. Craig, the principal debtor, together with his wife Rowena S. Craig, William M. Craig, his son, Lucy Craig, his son's wife, Nathan B. Craig, his brother, George L. Woolsey, Arthur T. Craig, another son, and the State National Bank of Lincoln. The petition sets out and alleges the recovery of a judgment by the said James Sweet against the said William R. Craig for the sum of two thousand three hundred and sixty-nine dollars and nineteen cents in the district court of Otoe county on the 21st day of April, 1881. The issuance of an execution for the collection of said judgment, and its return wholly unsatisfied for the want of goods or chattels, lands or tenements, of the said William R. Craig, whereon to levy the same.

The petition also contains an allegation to the effect that on and previous to the 24th day of February, 1880, the said William R. Craig held a claim against the State of Iowa, of fifty thousand dollars and over, growing out of a contract for the erection of a deaf and dumb asylum for said state, near Council Bluffs, which claim the said William R. Craig was then engaged in prosecuting before the legislature of the said state of Iowa, and that the said William R. Craig, for the purpose of securing the debt merged in the above mentioned judgment, recovered in said court by said James Sweet against said William R. Craig, and to secure other moneys due from him to Isaac A. Miller on that day, by an assignment in writing and power of attorney irrevocable, did sell, assign, and set over to the plaintiff and Isaac A. Miller the said claim, and delivered to them the irrevocable power of attorney aforesaid. That afterwards, on the 26th day of March, 1880, the legislature

of the state of Iowa, made an appropriation to pay said claim, amounting to the sum of twenty-three thousand nine hundred and fifty-six dollars and fifty cents, and by law directed the auditor of the state of Iowa, upon the said defendant, William R. Craig, filing in said auditor's office a receipt in full for all claims held by him against said state on account of building said deaf and dumb asylum, to issue his warrant on the state treasurer for the said sum of twenty-three thousand nine hundred and fifty-six dollars and fifty cents. That afterwards, on the 17th day of April, 1880, the said defendant, by duplicity, stealth, and fraud, filed such receipt with the auditor, and received from him the auditor's warrants on the state treasury of said state to the amount of twenty-three thousand nine hundred and fifty-six dollars and fifty cents, of which sum at least nine thousand dollars is fraudulently concealed by the said defendants, William R. Craig, Rowena S. Craig, William M. Craig, and Arthur T. Craig. That over five thousand dollars of said sum has been invested in certificates of deposit issued by some bank and other securities negotiable by delivery or by endorsement in blank, which said defendants pass from hand to hand and fraudulently conceal for the purpose of preventing the collection of plaintiff's judgment, and to avoid the same being taken in execution to satisfy the said judgment; and that the said defendants, William R. Craig, Rowena S. Craig, his wife, William M. Craig, and Arthur T. Craig, hold in secret trust to and for the use of the defendant, William R. Craig, other articles of personal property purchased with the proceeds of the said treasury warrants so issued by the auditor of the state of Iowa to the defendant, William R. Craig, as aforesaid, etc. Also that the said William R. Craig is the equitable owner of the following described real estate, situate in the county of Lancaster, namely, lot nine, in block seventy-one, in the city of Lincoln. The south half of the south-east quarter of section twenty-two,

in township eleven north, of range six east of the sixth principal meridian; the south half of the south-east quarter of section twenty-eight, in township eight north, of range eight east of the sixth principal meridian; and the north-east quarter of the north-east quarter of section thirty-three, in township eight north, of range eight east of the sixth principal meridian. That the title to the above described lot nine, in block seventy-one in the city of Lincoln is held by and in the name of the said defendant, Nathan B. Craig, who resides in the county of Joe Daviess, in the state of Illinois, in secret trust for the use of said defendant, William R. Craig. That the title to the above described tracts of land situate in the county of Lancaster, is held by and in the name of the defendant, William M. Craig, who is, as a son of the defendants, William R. Craig and Rowena S. Craig, in secret trust for the use of the said defendant, William R. Craig, and that the defendant, Lucy Craig, is the wife of said defendant William M. Craig, etc., and that said defendant William M. Craig at the time of taking said title was wholly insolvent.

That the defendant, Arthur T. Craig, who is the son of the defendants, William R. Craig and Rowena S. Craig, and resides in Otoe county, has in his possession a stock of harness and saddlery leather, tools, harness trimmings, and all the necessary things for the carrying on of the business of a harness maker and dealer in harness, which were purchased with money derived from the sale of the treasury warrants received by the said William R. Craig from the state of Iowa as aforesaid, furnished by said William R. Craig, through the said Rowena Craig, to the defendant, Arthur T. Craig; that in equity the said William R. Craig is the owner of the said stock of harness and material for the manufacture of harness and saddlery, etc. That the said defendant, Rowena S. Craig has and holds in her own name a large amount of the stock of the State National Bank of Lincoln, to-wit: forty shares of the par value of

one hundred dollars per share, amounting to four thousand dollars, which was originally purchased by the said William R. Craig in the month of June, 1880, of Joseph J. Imhoff assigned to Rowena S. Craig, one of these defendants, wife of the said William R. Craig, to be by her held in trust for the use of said William R. Craig. That payment was made for said bank stock to said Imhoff by said defendants, William R. Craig and Rowena S. Craig, by the said William R. Craig endorsing over, and delivering over and delivering to the said Imhoff a treasury warrant for the sum of five thousand dollars, dated April 17, 1880, upon the treasury of the state of Iowa; that the said Imhoff executed to the defendant, Rowena S. Craig, his note for one thousand dollars, the difference between the value of the said treasury warrant and the said bank stock. That the said stock is the property of said defendant, William R. Craig, and ought to be applied to the payment of plaintiff's said judgment. But the defendant, Rowena S. Craig, fraudulently conceals such bank stock to prevent its being taken in execution to satisfy said judgment of plaintiff.

Also that the defendant, George L. Woolsey, holds some property, deed to some real estate, tax title, tax certificate or other thing of value, in which the said William R. Craig is in some manner beneficially interested, which ought to be applied to the payment of the said judgment. That the said defendants are about and threaten to transfer, assign, and dispose of the property so held by them in secret trust for the benefit of said defendant, William R. Craig, etc. With prayer for judgment, the appointment of a receiver, etc.

The defendants, William M. Craig and Lucy, his wife, William R. Craig, George L. Woolsey, Nathan B. Craig, and Arthur D. Craig, sued by the name of Arthur T. Craig, filed their several and separate answers therein. Thereupon on the 23d day of May, 1882, the plaintiff filed a supplemental petition setting up the recovery of another

and additional judgment by him against the said defendant, William R. Craig, for the sum of four thousand six hundred and forty-three dollars and thirty-five cents damages, and eighty-six dollars and thirteen cents costs of suit, in the district court of Otoe county.

Thereupon the defendant, Rowena S. Craig, filed her several and separate answer to the said petition and supplemental petition, in which answer she first denied all and singular the matters charged against her by the said plaintiff in his said petition and supplemental petition. Secondly, she set out the fact of the imprisonment of the defendant, William R. Craig, by the said plaintiff upon an execution issued upon the first or original judgment by the said plaintiff, against said defendant, William R. Craig, and described in the original petition, and claimed such imprisonment of the said principal defendant, and his discharge therefrom by order of the court, as a full discharge of said defendant from the said judgment.

For a third defense the said defendant, Rowena S. Craig, set forth and alleged in and by her said answer that before the recovery by the said plaintiff of the judgments or either of them, upon which the said creditor's suit is founded, she owned in her own right and name and in good faith, twenty-five shares of one hundred dollars each of the capital stock of the said State National Bank of Lincoln, for which she paid in her own funds the sum of four thousand dollars, and that the said shares and the funds and money with which they were purchased were the personal property of the said answering defendant, and not subject to the demands of the said plaintiff, nor of the creditors of the husband of her the said defendant, the said William R. Craig, and not liable to execution for the satisfaction of the money claimed to be due on the said judgments as set forth in said plaintiff's petition, because she says that on the 15th day of September, 1868, the said defendant, William R. Craig, was her husband and had been

for many years prior thereto, and that he, the said William R. Craig, had about that time, but before said last named date, contracted with the State of Iowa to erect a deaf and dumb asylum for said state, the same to cost \$121,500; that the said defendant, William R. Craig, needed large sums of money to-wit, from \$5,000, to \$10,000 to enable him to carry out said contract, and the said William R. Craig was then insolvent and did not own any property, and could not raise money to enable him to carry on said contract, and as it was the wish and desire of both this defendant and her husband, the said William R. Craig, that he should fulfill and carry out said contract, a parol contract or agreement was made and entered into by and between the said William M. Craig and herself the said answering defendant whereby it was agreed and understood that if the said William R. Craig could and would obtain a loan of sufficient money to carry on said contract on the note of the said William R. Craig, secured by a mortgage of himself and this answering defendant on their homestead, to-wit: lots one, two, and three in block twelve in Nebraska City proper, and which said premises were then and had been for some time prior thereto, owned in fee simple by said answering defendant, Rowena S. Craig, and which said premises were then of the value of \$7,000 to \$9,000; that as the consideration to her, the said Rowena S. Craig, to execute such mortgage on her said homestead, and to procure the loan she, the said Rowena, should receive out of the money or proceeds received and obtained from the said state of Iowa for said asylum the sum of \$5,000. That after the foregoing agreement had been made as aforesaid, and by reason of the promise of this answering defendant to execute the mortgage as aforesaid, the said William R. Craig, on the said 15th day of September, 1868, obtained a loan of \$3,000 on his note secured by a mortgage of himself and said Rowena S., on her said homestead from one Rollin M. Rolfe; that before signing the said mort-

gage to said Rolfe to secure the said \$3,000 and future advances, the aforesaid parol contract and agreement was again made and entered into between the said William R. Craig and the said Rowena S. Craig whereby it was agreed and understood that for the security of this defendant and an inducement for her, and as the consideration to her, to execute the said mortgage on her said homestead to procure the said \$3,000 loan and future advances, that she should receive the sum of \$5,000 in money or its equivalent of the money or proceeds procured and obtained from the state of Iowa for said asylum contract as hers absolutely in order to protect her said homestead against the said mortgage.

The said defendant, Rowena S. Craig, in and by her said answer further set out and averred that of the said moneys received and borrowed on the said note and mortgage, she never received one cent, but that the whole and entire sum was expended by the said defendant, William R. Craig, in the building of said asylum, and that afterwards on the 23d day of May, 1870, the said William R. Craig, wanting more funds to carry on and fulfill his said asylum contract, obtained another loan of \$3,000 of one Oliver Stevenson, on the certain other note of the said William R. Craig, secured by a certain other mortgage of himself and her, the said Rowena S., on her said homestead and as the said William R. was still insolvent, and for the security and as an inducement for her the said Rowena S. to execute said mortgage to said Stevenson before signing the said Stevenson mortgage, the aforesaid parol contract and agreement as hereinbefore set forth was again made, renewed, repeated, and entered into by and between the said William R. Craig and her the said Rowena S., whereby it was again agreed and understood that the said Rowena S. was to have the said five thousand dollars and one thousand dollars additional when said sums were paid said William R. Craig by said state of Iowa for building said asylum,

as the consideration to her to execute the said Stevenson mortgage on her said homestead to procure the loan aforesaid of said Stevenson. The said defendant, Rowena S., further alleged that all of this last loan was used and expended by said William R. in the further building of said asylum; that both of said mortgages have become due and payable, and suits have been commenced in the proper court of said Otoe county to foreclose said mortgages, and decrees have been entered therein to sell said premises, and that she, the said Rowena S., has been by reason thereof forced to abandon her said homestead, and leave it to her said creditors, the said mortgagees and their assigns, of whom the said plaintiff is one.

The said defendant, Rowena S., further alleged, in and by said answer, that the note on which the judgment set forth in the plaintiff's original petition was founded was executed long after the execution of the aforesaid mortgages and the making of the aforesaid parol contract, and that at that time the plaintiff well knew of said parol contract, and that all the matters and things set forth in the plaintiff's petition and supplemental petition took place long after the making of said parol contract between the said Rowena S. and her husband, the said William R., and at a time the plaintiff well knew of the existence of the said parol contracts. She further alleged that the said parol contract between the defendant and her husband, William R. Craig aforesaid, was made with the full knowledge, consent, advice, and concurrence of the said plaintiff, who was then and there acting as the attorney and counselor of the said William R. Craig in reference to the building of said asylum, and in procuring said loans. Said Rowena S. further alleged that on the — day of April, 1880, the said William R. received of said state of Iowa for work and materials done and furnished for said asylum, according to the aforesaid contract, a payment of about twenty-three thousand dollars, out of which said

sum and proceeds, and according to the said parol contract, he paid the said Rowena S. the sum of five thousand dollars. That this was the first proceeds of said building contract obtained by the said William R., out of which he could pay the said Rowena S., and the first and only payment or proceeds received by her the said defendant, Rowena S., of or from the said William R. Craig on said parol agreement, etc. She also alleged that out of said five thousand dollars, she the said Rowen S., has invested in bank stock as aforesaid. The balance she has used in her support, and the payment of her indebtedness. She further alleged that the said bank stock is all the property she owns except a horse and buggy and a few household goods; that she is aged and infirm, and has no way of making a living. That the said money was received by her from the said William R., *bona fide* for the above stated considerations and without any intent to defraud or to hinder or delay the said plaintiff or any of the creditors of the said William R. Craig, and without any knowledge, information, or belief other than that the said money received was her personal property and not subject to the demands of the creditors of her said husband, etc.

The defendant Nathan B. Craig made answer in the shape of a general denial to the petition and supplemental petition.

The cause was tried to the court which found for the defendant, Rowena S. Craig, and that she was the owner of the bank stock mentioned in the petition. The court also found for the defendant Nathan B. Craig, and that he is the owner of lot 9 in block 71 in the city of Lincoln. The court also found in favor of the defendant State National Bank. The court found against the defendants William M. Craig, Lucy Craig, and William R. Craig, and in favor of the plaintiff as to their interest in and to the south half of the south-east quarter of section twenty-two, in township eleven north, of range six east in Lancaster

county, and that the same should be subjected to the plaintiff's judgment.

And thereupon it was adjudged and decreed by the said district court that plaintiff take nothing by his writ as against all of the defendants in said action, except said William M., Lucy, and William R. Craig, in so far as relates to the said south half of the south-east quarter of section twenty-two aforesaid. And it was further adjudged and decreed by the court that the judgment in favor of plaintiff and against William R. Craig, recovered in the district court of Otoe county on the 30th day of September, 1881, for the sum of \$4,643.34 and \$86.13 costs and accruing costs, with interest on said judgment from the date of its recovery at seven per cent per annum, be and is hereby declared to be a lien upon said interest in and to the said south half of the south-east quarter of section twenty-two, in township eleven north, of range six east of the sixth principal meridian in Lancaster county aforesaid. And that the same be sold as upon execution by the sheriff, etc.

The case is brought to this court on appeal by the said plaintiff as well as upon cross-appeal by the defendants William M. Craig and Lucy Craig.

The cause was argued by counsel on either side and submitted on exhaustive briefs at the July term, 1883, when an unanimous conclusion upon all branches of the case was reached by the court as then constituted, and the papers were taken by then C. J. LAKE for the purpose of preparing an opinion. But at the close of his term of service he returned the case with some few others as not reached.

The record is voluminous, and yet scarcely anything is presented by it but questions of fact, and these having been passed upon by the trial court in its findings, such findings can only be disturbed by this court when unsustained by sufficient evidence.

The title of the defendant Rowena S. Craig in the home-

stead formerly occupied by the Craig family at Nebraska City has been before this court in the case of *Stenson v. Craig*, 12 Neb., 464. Also in the case of same parties decided at the present term, by which we have confirmed the sale of said homestead to satisfy a mortgage executed by the said Rowena S. to raise money for the said William R. Craig to enable him to carry on his contract with the state of Iowa for the erection of the said deaf and dumb asylum. One of the principal allegations of the answer of said defendant Rowena S. is, that at the time she executed the said mortgage upon the homestead it was agreed between her and the said William R. Craig that she should be indemnified for any loss growing out of said mortgage out of the proceeds of said contract with the state of Iowa, and that the money with which the twenty-five shares of stock in the State National Bank of Lincoln were purchased was paid to her by the said William R. Craig in discharge of that agreement and not in fraud of the rights of said plaintiff. Upon this defense the district court found in favor of the said defendant; and we think such finding is sustained by the evidence.

The district court also found for the defendant Nathan B. Craig that he is the owner of lot nine in block seventy-one in the city of Lincoln. This finding is sustained by the evidence. The said court also found generally in favor of the defendants Arthur T. Craig and the State National Bank of Lincoln. These findings are also sustained by the evidence in the case, and the findings and judgment of the district court in favor of the above named defendants as aforesaid are affirmed.

The district court found against the defendants William M. Craig, Lucy Craig, and William R. Craig, and in favor of plaintiff as to their interest in and to the south half of the south-east quarter of section twenty-two, in township eleven north, of range six east in Lancaster county.

We are of the opinion that the last named finding is in

Sweet v. Craig.

part only sustained by the evidence, and that the judgment rendered thereon must be modified.

It appears from the testimony that the above described eighty acre tract of land was purchased by the said defendant William M. Craig on or about the 4th day of November, 1880, for the price of eight hundred dollars, three hundred dollars of which was paid from funds then in his own hands, and the other five hundred raised by mortgage on the said land. There is evidence tending to prove that the three hundred dollars paid on said land was of funds lent to said William M. by his father, William R., which ought to be applied to the plaintiff's said judgment. But there is no evidence to sustain the said decree making the plaintiff's said decree a lien upon the whole of the said William M. Craig's interest in the said land.

The judgment of the district court so far as the same is in favor of the plaintiff, and against the defendants William M. Craig and Lucy Craig is reversed, and a decree will be entered in this court in favor of the said plaintiff, and against the defendants William M. Craig and Lucy Craig, making the said judgment recovered by said plaintiff against said William R. Craig in the district court of Otoe county a lien on the interest of the said William M. and Lucy Craig in and to the said tract of land to the extent of three hundred dollars and interest thereon from the date of the purchase of said land, and no more.

DECREE ACCORDINGLY.

THE other judges concur.

15	362
439	215
15	362
52	708
55	355
55	444
55	758
15	362
58	21
15	362
60	9
15	362
61	227

ROWENA S. CRAIG, APPELLANT, V. OLIVER STEVENSON
ET AL., APPELLEES.

1. **Judicial Sale.** The mortgaged premises consisting of three city lots upon which were situated a dwelling-house and appurtenances, some portion of which extended to and upon each of the said lots, were properly sold in gross, and the sale upheld.
2. ———: **APPRAISEMENT.** The provisions of the statute requiring a sheriff to deduct from the real value of lands levied on, etc., the amount of all liens and incumbrances for taxes or otherwise, prior to the lien of the judgment under which the execution is levied, etc., being for the sole benefit of the plaintiff in such proceeding, may be waived by him.

APPEAL from Otoe county. Heard below before
POUND, J.

Watson & Wodehouse, for appellant.

S. H. Calhoun, for appellees.

COBB, CH. J.

This is an appeal from the judgment of the district court of Otoe county overruling certain exceptions to the report of the sheriff of the sale of certain mortgaged premises, and confirming the sale thereof.

The following are the points made by appellant in her exceptions:

"1. That said sale was illegal, irregular, and was not made according to law.

"2. There was no valid appraisalment made by the sheriff of the property pretended to be sold.

"3. That said lots were not appraised separately as required by law, that lot one in said block twelve was never appraised by said sheriff at all, and that lot three was not appraised at all.

"4. That there were no certificates of liens obtained by the sheriff or appraisers for said appraisement from the treasurer, nor from the clerk of the district court, nor from the county clerk of said county, nor were any such certificates ever filed with said appraisement, as required by law.

"5. That said appraisement was not made as is required by law, to-wit: by ascertaining the gross value of each of said lots and deducting the liens therefrom.

"6. That plaintiff's attorney had no right or authority to waive said certificates of liens.

"7. That no copy of said pretended appraisement was ever filed or deposited in the office of the clerk of said court.

"8. That said lots were not offered for sale or sold separately, as required by law."

It appears from affidavits filed at the hearing of the motion to set aside the sale, and in resistance of the motion to confirm the same, that the property consists of three lots of less than the usual size, in said Nebraska City; that said lots adjoin each other and are cut off and isolated from all other lots by either streets or alleys; there is a dwelling-house situated upon said lots, some part of which dwelling and appurtenances extends to and upon parts of each of the said lots.

In an early case, *Laughlin v. Schuyler*, 1 Neb., 409, this court stated the law, as applicable to that case, that each lot or parcel of ground should have been appraised and sold separately. The report of this case is quite meagre, the only fact given being that the case was an appeal from an order confirming a sale of mortgaged premises upon a decree of foreclosure. But in the case of *Eaton v. Ryan*, 5 Neb., 47, the court, in the opinion by C. J. LAKE, who also wrote the opinion in the other case, say: "The fact that the tract of land as sold in one body was composed of what was formerly distinct parts of separate city lots is of no consequence, nor does it bring the case within the rule laid

down in *Laughlin v. Schuyler*, 1 Neb., 409, where it was held that two city lots entirely distinct from each other should be appraised and sold separately."

It was the practice of courts of equity, as I understand it, before the adoption of the code system, in most of the states, to decree the sale of mortgaged premises, although composed of several parcels, together, except when, in the language of the decree, the same could be sold separately without injury to the parties interested therein. But it is not necessary to distinguish this case from *Laughlin v. Schuyler*, as explained by *Eaton v. Ryan*, in order to uphold the sale in the case at bar on that point.

The provisions of the statute for the ascertaining of prior liens existing on lands appraised for sale on legal process, and for deducting the amount of such liens from the value of such lands, and fixing the amount of such value less that of all prior liens as the true amount at which lands shall stand as appraised, etc., were enacted solely for the benefit of the plaintiff in such proceedings, and neither for the benefit of the defendant, nor of strangers who may become bidders at such sale. It therefore follows that the plaintiff may waive the lien certificates. He certainly can in a case like the one at bar, where there was a moral certainty that there would be a large deficiency and the plaintiff obliged to lose all costs and disbursements.

The order of the district court confirming the sale must be affirmed. By the court,

ORDER AFFIRMED.

THE BURLINGTON & MISSOURI RIVER RAILROAD, PLAINTIFF IN ERROR, v FRANK FRANZEN, DEFENDANT IN ERROR.

15	365
27	807

Railroad: FENCES. A railroad company which fails to fence its track at a place where by statute it is required to fence, is liable for stock killed or injured on its track by its engines or cars, and the mere negligence of the owner of the stock is no defense.

ERROR to the district court for Cass county. Tried below before POUND, J.

Marquett, Deweese & Hall, for plaintiff in error.

Chapman & Beeson, for defendant in error.

MAXWELL, J.

This is an action brought by the defendant in error to recover the value of a cow killed by the cars of the plaintiff at a point on its railroad where it was required by statute to fence its track but had failed to do so. The railroad company in its answer admits that the cow was killed by an engine on its railroad track, which at the time was operated by the company's agents, and that notice and affidavit of the killing were duly served on the company's agents, etc. For further answer it is alleged "that said killing occurred by reason of the fault and negligence of the plaintiff, and without any fault or negligence on the part of the defendant." There is no reply, and it is strongly urged on behalf of the plaintiff in error that the allegation of negligence is thereby admitted, and thereby the company excused. On the trial of the cause in the court below a verdict was returned in favor of the defendant in error, upon which judgment was rendered.

It appears from the testimony that the animal in question was killed a short distance east of Cedar Creek village, in Cass county; that at the place where the accident oc-

curred the track runs near the Platte river, there being a shallow channel of the river between the south bank and an island on which the defendant pastured his cattle. It also appears that it was the duty of the company to fence its track at this point, and that it had constructed a fence on the south side but none on the north. There is no claim that the defendant's cattle were willfully on the track, and the proof fails to show negligence. But even if negligence was admitted it would afford no excuse where stock is killed by the cars at a point on a railroad where it is its duty to fence the track but it fails to do so. The question here presented was before this court in the case of *The B. & M. R. R. Co. v. Brinkman*, 14 Neb., 70, and it was there held that the liability of the railroad company exists by reason of the statute, without regard to the question of negligence. The statute declares in substance that every railroad corporation whose lines of road or any part thereof is open to use shall, within six months thereafter, erect and maintain fences on the sides of said railroad suitably and amply sufficient to prevent cattle, horses, sheep, and hogs from getting on said railroad, except at the crossings of public roads and highways, and within the limits of towns, cities, and villages, etc.; and declares the penalty for "failing to fence on both sides thereof against all live stock running at large at all points," that the company "shall be absolutely liable to the owner of any live stock injured, killed, or destroyed by their agents, employees, or engineers," etc. Comp. Stat., ch. 72, art. I. The statute is plain and unambiguous, and leaves no room for construction. A railroad company failing to fence its track at a point where it is required to fence is liable for stock killed or injured on its track by its engines or cars, and the mere negligence of the owner of the stock is no defense.

The judgment of the court below is clearly right, and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JULIANA DRATH, PLAINTIFF IN ERROR, V. THE BURLINGTON & MISSOURI RIVER RAILROAD, DEFENDANT IN ERROR.

1. **Eminent Domain: JUDGMENT: EXECUTION.** Where a lot was condemned by a railroad company, the money deposited with the county judge, an appeal taken to the district court, and a verdict rendered in favor of the lot owner, it is the duty of the district court to render judgment on such verdict, and an execution may be issued thereon.
2. ———: **RAILROAD CANNOT ABANDON LOT.** After a judgment in the district court for the value of real estate condemned by a railroad company, it cannot abandon the same and in that way avoid the payment of the judgment.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

A. J. Sawyer and *A. C. Ricketts*, for plaintiff in error, cited: *Freeman on Executions*, §§ 10, 21, 23, 43. *Dillon Mun. Corp.*, § 479. 2 *Greenleaf*, 179. 67 *N. Y.*, 242. 22 *Pick.*, 263. 121 *Mass.*, 173. 8 *Bush*, 98.

Marquett & Deweese, for defendant in error, cited: *Chicago v. Barbican*, 80 *Ill.*, 485. *St. Louis Railway v. Teters*, 68 *Ill.*, 144. *Garrison v. City of New York*, 21 *Wall.*, 196. *Stacey v. Vermont Central R. R.*, 27 *Vt.*, 39.

MAXWELL, J.

In February, 1880, the defendant caused lot 7 in block 72 in the city of Lincoln to be condemned for its use, the value of the same being fixed at \$300. The plaintiff appealed to the district court, where, in November, 1880, a verdict was returned in her favor for the sum of \$800. A motion for a new trial was filed and overruled, and judgment rendered thereon as follows: "It is therefore consid-

ered by the court that the said plaintiff recover from said defendant the sum of eight hundred dollars (\$800) as heretofore by the verdict of the jury found due her, with interest thereon from this date, together with her costs herein expended, taxed at \$—. And it is ordered by the court that the said defendant, the Burlington & Missouri River Railroad Company in Nebraska, forthwith pay over to the said plaintiff, Juliana Drath, the said sum of eight hundred dollars (\$800) compensation for her said lands so appropriated by them to their uses and purposes aforesaid, together with her costs herein expended, and that the decree and judgment of the court be transmitted by the clerk thereof, duly certified, to the county clerk of Lancaster county, Nebraska, to be by him filed and recorded as provided by law."

On the twenty-first of December, 1880, the attorneys for the railroad company filed the following:

"The defendant, the railroad company above named, having heretofore instituted proceedings, under the statute, for condemnation of lot 7 (seven), block 72 (seventy-two), city of Lincoln, Nebraska, for right of way for its line of road, in which proceedings notice was given to Juliana Drath, above named, under the impression that she was the owner of said lot, and an award of damages having been made, from which said Juliana Drath appealed to this court, and it having been ascertained upon investigation that said Juliana Drath is not possessed of the legal title to said lot, and for other reasons, the said railroad company hereby abandons said condemnation proceedings, having paid all the costs made therein, and declines to appropriate said lot or any part thereof to its use by virtue of said proceedings, and declines to pay the award of damages made therefor, or to claim any right, privilege, title, or interest in said lot by virtue of said proceedings."

The answer of the defendant in the district court was as follows:

"Now comes the defendant, and answering the claim of the plaintiff says, that the plaintiff is not the owner of the lands mentioned in said condemnation proceedings, being lot 7, block 72, city of Lincoln, and is not damaged by said condemnation proceedings."

The question of title to the lot in question was thus put in issue by the answer, and was determined by the verdict in favor of the plaintiff, and need not be further considered.

Execution having been issued, the attorneys for the defendant filed a motion in said court, as follows:

"Now comes the defendant above named and moves the court to order the return by the sheriff of said county of the execution issued in the above entitled cause, for the following reasons: 1st. It appears by affidavit and papers hereto attached and referred to in said affidavit that the condemnation proceedings had in the above entitled case have been abandoned by the said railroad company, and costs made therein paid by the company. 2d. That plaintiff has never been disturbed in her possession and control of said lot mentioned in condemnation proceedings, and said railroad company never have taken possession of any portion thereof. 3d. That no execution can legally issue for collection of the award of damages found by the jury."

This motion was supported by an affidavit. On the twenty-fifth of March, 1881, the following order was made on the motion:

"This cause came on to be heard upon motion for order to return execution issued herein; and the court, after hearing the argument of counsel, sustained said motion, and execution ordered returned without prejudice to plaintiff, and with leave to plaintiff to file motion hereafter to issue another execution."

Afterwards, in June, 1881, the plaintiff filed a motion to have an execution issued, upon which motion the following order was made:

"And the motion having been heretofore argued and

submitted, and the court being duly advised in the premises, and the former execution herein having been recalled by the court, on due consideration the court overrules said motion; and it is hereby further ordered that no execution issue on the judgment in this cause, to which ruling of the court plaintiff duly excepts, and forty days given to reduce exceptions to writing."

It will be seen that the only questions for determination are, the authority of the court below to order the execution to be recalled, and the denial of the right to enforce her judgment by the issuing of further executions.

It is contended on behalf of the railroad company that there was no authority in the district court to render judgment on the verdict, and that therefore the judgment was a mere award of damages, which the company may pay when it sees fit. A number of cases are cited that apparently sustain that view, but we are unable to give our assent to them. The question here presented was before this court in the case of *Dietrichs v. L. & N. R. R. Co.*, 12 Neb., 225, and it was held that it was the duty of the district court to render judgment on the verdict of the jury. The opinion was written by the present chief justice. It is said (pages 231-2): "We think that had it been the intention of the legislature to make this class of cases an exception to the general rule they would have expressed that intention in clearer terms than they have used in the statute bearing upon that subject. * * * The case therefore furnishes a strong illustration of the hardship of the rule contended for by the railroad company, to-wit, that the owner of the land condemned has no right to either the money or a judgment for it until such time as it may suit the convenience of the railroad company to take or be about to immediately take possession of the property," etc. Every principle of justice sustains the case above cited, and we fail to see any reason for modifying or changing that decision.

The statute gives a railroad company almost unlimited

Drath v. B. & M. R. R. Co.

powers in regard to what real estate it requires for its use, and unless it is clear that this power is abused, a court would have no right to interfere. But the company must act in good faith. It cannot be permitted to condemn real estate for its use, and after the condemnation is complete, the certificate filed with the county clerk, and the amount of the award deposited with the county judge, an appeal taken to the district court and judgment rendered against it on such appeal, be permitted to abandon the proceedings. The power of eminent domain is placed in its hands to enable it to take such real estate as it may require, at its fair value. This, if the case is appealed to the district court, is to be ascertained by the verdict of a jury, based upon the evidence. Where, as in this case, the entire property is taken, the power of the lot owner to sell or mortgage the premises is entirely taken away while the proceedings are pending. The necessities of such owner may be very great, and the property condemned his entire estate, yet when the public good requires it he must submit to the delay in obtaining compensation for his property. But the court will not permit a railroad company to use the sovereign power of the state—that of eminent domain—as a means to enable it to obtain property at its own price, or failing to do so refuse to take it. If this could be done, the rights of property owners along a line of railway would indeed be insecure. But such is not the law. When a company has condemned real estate, and on appeal a judgment has been rendered against it, which remains in full force, it must like other litigants pay the judgment, and the judgment creditor is entitled to all the remedies given by law to enforce the same. It follows that the order of the district court denying the right to issue execution is reversed, and the cause is remanded to that court with leave to the plaintiff to issue execution on her judgment as in other cases.

JUDGMENT ACCORDINGLY.

THE other judges concur.

ADAM W. SNYDER, PLAINTIFF IN ERROR, V. OLIVER A. JENNINGS, DEFENDANT IN ERROR.

1. **New Trial.** When the finding and judgment of the trial court are supported by sufficient evidence a new trial will not be ordered unless prejudicial error affirmatively appears.
2. **Deed: WARRANTY: POSSESSION.** If the grantee of a conveyance of land, without the knowledge or consent of his grantor, surrender possession to one claiming under an adverse title, he cannot thereafter maintain an action upon the covenants of warranty contained in the deed from his grantor, without alleging and proving that the title to which he surrenders is paramount to the title received from his grantor.
3. ———: **EVIDENCE: FORGERY.** When a deed is introduced in evidence, and it is shown by sufficient testimony that the alleged grantor has been absent from the state and his whereabouts unknown for more than ten years, and a claim of title under such deed is made for the first time, the alleged deed having existed more than twenty-three years, the admission of evidence impeaching the deed as a forgery, *Held*, Competent.

ERROR to the district court for Richardson county.
Tried below before DAVIDSON, J.

E. W. Thomas, for plaintiff in error, on subject of paramount title, cited: *Thomas v. Stickle*, 32 Ia., 71. *Funk v. Creswell*, 5 Ia., 62. *Hamilton v. Cutts*, 4 Mass., 348. *Sprague v. Baker*, 17 Mass., 585. 2 Wait's Actions and Defenses, 383-388-389. *Cowdrey v. Coit*, 44 N. Y., 392. On forgery of deed, cited: 1 Green. Ev., §§ 569, 574. *Dolph v. Barney*, 14 Am. L. Reg., 748. *McPherson v. Sanborn*, 88 Ill., 150. *Mulloy v. Ingalls*, 4 Neb., 121.

Martin & Gilman and *C. Gillespie*, for defendant in error, cited: *Scott v. Twiss*, 4 Neb., 138. *May v. LeChuire*, 11 Wall., 217. *Mann v. Best*, 62 Mo., 491. *Bragg v.*

Paulk, 42 Me., 502. *Smith v. Dunton*, 42 Ia., 48. *Filley v. Duncan*, 1 Neb., 134. *Uhl v. May*, 5 Neb., 160. Starkie on Evidence, 503. *Duckwall v. Weaver*, 2 Ohio, 13. Story's Eq. Jurisprudence, § 1520 and note.

REESE, J.

This action was brought by the plaintiff in error against the defendant in error, in the district court of Richardson county, to recover damages for the breach of covenant of title contained in a deed of conveyance of land. The petition alleges that on the twenty-eighth day of November, 1873, the defendant, by warranty deed containing the usual covenants of warranty, deeded to the plaintiff the land described therein, and that the plaintiff immediately thereafter took possession of the same. That on the first day of March, 1882, one John P. Johnson, having purchased of Joseph R. Hare the paramount title to said land, demanded possession, and the plaintiff yielded possession and purchased the title held by Johnson for the sum of three hundred dollars, whereby he was damaged, etc.

The answer denies all the allegations of the petition except the sale of the land by defendant to plaintiff and the continued possession and occupancy thereof by plaintiff, and alleges that Joseph R. Hare never was the real owner of the land, but held the title thereto in trust for his brother, Thomas R. Hare, and that said Johnson purchased the interest of Joseph for a nominal sum, with full knowledge of that fact.

The cause was tried to the court without the intervention of a jury, resulting in a finding and judgment for the defendant. The plaintiff brings the case into this court by petition in error.

A number of alleged errors are assigned by plaintiff, but it is not thought necessary to examine all, as it is well settled that if upon any theory of the case the judgment of

the trial court was correct the decision will have to be upheld.

It appears from the proofs that Joseph R. Hare sold the land in question to Thomas R. Hare, about the fifth day of August, 1858, but by a misdescription in the deed the numbers of this land were omitted, and another tract of land substituted without the knowledge of either of the parties. Joseph never at any time after said conveyance exercised any acts of ownership over the land, nor claimed any interest therein until the ninth day of February, 1882, when Johnson approached him with the purpose of procuring a conveyance of the land to himself. Hare testifies that Johnson told him he would make him a present of twenty-five dollars if he would give him a quit-claim deed to the land, and that he repeatedly told Johnson he had no interest in it and claimed no right to it; that if he had not deeded it to his brother it was an error in the deed. Johnson, in his testimony, admits that the consideration for the conveyance was twenty-five dollars, and that his grantor, Joseph R. Hare, "did not set up any claim" to the land. And the evidence throughout clearly shows that Johnson took his deed with full notice of all the facts, and that Joseph had no interest whatever in said land. He also had notice of all the rights of the plaintiff, who was then in possession of the land under a direct chain of title from Thomas R. Hare.

It cannot be said that Johnson could have maintained an action against plaintiff for this land. Such being the case, plaintiff could not voluntarily surrender to him without notice to the defendant and hold defendant liable on the covenants in his deed.

Plaintiff insists that even if the foregoing be the correct view yet he is entitled to recover one-half the amount alleged to have been paid to Johnson, for the reason that on the fifteenth day of February, 1865, Thomas R. Hare conveyed to Mary Jane Hare, his then wife, the undivided one-

half interest in this land, and that on the twentieth day of January, 1882, after her divorce and remarriage, she conveyed her interest therein to said Johnson. Upon an examination of the plaintiff's petition, we find no reference whatever to any title obtained from or through the deed to Mrs. Hare, but plaintiff's claim is based upon the adverse title of Joseph R. Hare. Hence the court could well and perhaps did conclude that plaintiff depended alone upon the title received through the conveyance from Joseph R. Hare. But, be that as it may, the genuineness of the alleged deed from Thomas R. Hare to his wife was submitted to the court, and "all the issues" being found in favor of the defendant, we conclude the court found this deed to be a forgery, and as there is sufficient evidence to sustain this finding we cannot interfere with it.

The plaintiff assigns for error the admission of the testimony of witnesses tending to show that the signature of Thomas R. Hare to the deed was not his genuine signature. It is insisted that as the deed is accompanied with the certificate of acknowledgment in the usual form, and is attested by the acknowledging officer as subscribing witness, no impeaching testimony was competent except that of the alleged grantor, the acknowledging officer, and the subscribing witness; that if a third person had signed Hare's name in his presence and at his request it would have been sufficient. The evidence shows clearly that Thomas R. Hare has engaged in business to a greater or less extent, and has kept his own books and carried on his correspondence in his own handwriting. The witnesses testify that they have often seen his writing, have seen his signature frequently, and have often seen him sign his name. It is also proven by his relatives that he left this state in 1866, that he corresponded with them until during the year 1870, and that he has not since been heard from by them. Considering the length of time intervening between the date of this deed and the first effort made to claim any rights under it, we

see no error in the ruling of the court in admitting the evidence complained of.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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CHARLES EVERETT, PLAINTIFF IN ERROR, V. JOHN F. HOBLEMAN, DEFENDANT IN ERROR.

1. **Practice: NEW TRIAL: VERDICT.** A verdict will not be set aside and a new trial ordered on account of a conflict in the testimony, except where it is clearly wrong.
2. ———: **PREJUDICIAL ERROR MUST BE SHOWN.** A new trial will not be ordered unless it appears that the party complaining has been deprived of a substantial right. Error without prejudice is not sufficient to warrant the setting aside of a verdict.

ERROR to the district court for Gage county. Tried below before WEAVER, J.

J. N. Rickards and *J. E. Bush*, for plaintiff in error.

R. S. Bibb, for defendant in error.

REESE, J.

This action was commenced in the district court of Gage county by the defendant in error for the sum of \$98.03 alleged to be due him from the plaintiff in error as damage resulting from the conversion of certain property and notes placed in the hands of the plaintiff in error to secure to him the sum of \$280 furnished to the defendant in error, and also to secure the payment of certain expenses incurred by

the plaintiff in error at the request and for the benefit of defendant in error. The defendant in error alleged in his petition that the notes and property delivered to the plaintiff in error exceeded the amount advanced and expenses incurred by plaintiff in error to the amount for which the suit was brought.

The plaintiff in error answered the petition, denying that said property was delivered to him as collateral security, but alleged that it was sold to him, absolutely, by defendant in error, and that one note of \$150.13, alleged by defendant in error simply to have been given by him as further security for the said sum of \$280, was for a balance due plaintiff in error on a settlement of all their dealings and for a threshing machine which the defendant in error that day bought of plaintiff in error. He also demanded judgment against the defendant in error for the sum of \$20 alleged to be due him from the defendant in error as damages for the failure to deliver to him one cow of that value, which he alleged he had purchased of the defendant in error with the other property referred to in the pleadings. No reply was filed.

The cause was tried to a jury, who returned a verdict for the defendant in error, and assessed his damages at \$6.49. A motion for a new trial was made, overruled, and judgment was rendered on the verdict.

The first assignment of error which requires attention is, that the district court erred in permitting defendant in error to show that certain notes mentioned in the petition had never been returned to him by the plaintiff in error. By an examination of the record we find that defendant's cause of action was based in part on the alleged conversion of the property for which these notes were received by the plaintiff in error. It is clear that if the plaintiff in error had accounted for or returned to the defendant in error those notes, nothing could have been claimed therefor, the property having been sold and the notes taken with the consent

of the defendant in error. In this action of the court there was no error.

The second point urged by the plaintiff in error is, that the verdict was against the weight of evidence. The evidence was conflicting, but the jury was the sole judge of its weight, and a verdict will not be set aside unless it is clearly wrong. *Young v. Hibbs*, 5 Neb., 433.

The remaining point, upon which plaintiff in error seems to rely, is, that he was entitled to a verdict of \$20 on his counter-claim, there being no reply filed denying it. Had the plaintiff in error requested it, the court would doubtless have instructed the jury to allow this claim, but no such request was made, and no mention of this point is made in the motion for a new trial. Such being the case, a new trial will not be ordered. *Folden v. The State*, 13 Neb., 332. But for aught that appears in the record the jury did allow the counter-claim and thereby reduce the amount of recovery.

The record showing no prejudicial error, the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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MARTHA E. REYNOLDS, APPELLANT, V. BENJAMIN F. COBB, APPELLEE.

1. **Judgment Lien.** The lien upon the real estate of a judgment debtor, created by a judgment in the district court of the county where the land is situated, continues for five years after the rendition of the judgment, and as against all persons, except *bona fide* judgment creditors, for five years after the issuance of execution.

Reynolds v. Cobb.

2. **Execution Sale: RIGHTS OF PURCHASER.** A sale of real estate upon execution vests in the purchaser all the rights of the judgment debtor at the time when the lien of the judgment attached to the land.
3. ———: **RETURN OF, AFTER LEVY WITHOUT SALE.** Where an execution was issued and levied upon real estate of the judgment debtor, but returned without making a sale, for the reason that there were no bidders, the effect of such return, where it is not sought to enforce the lien by further proceedings, is to discharge the property from the levy. The right of the judgment creditor to issue another execution and levy upon other property remains unimpaired.

APPEAL from the district court of Lancaster county.
Heard below before POUND, J.

John S. Gregory, for appellant.

• *R. D. Stearns*, for appellee.

REESE, J.

On the twenty-first day of April, 1875, the Merchants Bank of Lincoln obtained a judgment in the district court of Lancaster county against David Butler for the sum of \$645, and on December 16th, of the same year, execution was issued thereon and sent to the sheriff of Pawnee county for service. This execution was levied upon real estate of the judgment debtor, in said county, which was appraised, advertised, and offered for sale, but not sold for want of bidders, and the execution was returned so endorsed. No further action was taken until the sixth day of October, 1879, when another execution was issued directed to the sheriff of Lancaster county, who levied the same upon real estate belonging to the judgment debtor. This real estate was sold and the proceeds of the sale applied on the judgment, and the execution returned endorsed according to the facts. On the third day of December, 1880, a third execution was issued directed to the sheriff of Lancaster county,

and a levy was made on real estate, a part of which is the property in dispute in this action. This property was also sold and a deed made to the purchaser.

It is conceded that at the time of the rendition of the judgment, to-wit, April 21st, 1875, David Butler was the owner of the property in dispute, and it must also be conceded that a judgment lien attached to said land.

On the tenth day of August, 1877, David Butler and wife conveyed the property in dispute to H. E. Wells by warranty deed, and on the nineteenth day of January, 1878, he, by a similar conveyance, conveyed the property to the appellant, Martha E. Reynolds, who soon after went into the possession thereof, and has remained in possession ever since. She now brings this action to set aside the sheriff's deed to the appellee, who was the purchaser at the sheriff's sale, and to quiet her title. The decision of the district court being adverse to her, she brings the cause into this court by appeal, for review.

It is claimed by the appellant that the judgment ceased to be a lien as against purchasers in good faith or junior judgments unless a *levy* was made within five years from the date of its rendition. So far as junior judgments are concerned we think the appellant is correct, for section 509 of the civil code provides that "No judgment heretofore rendered, or which may hereafter be rendered, on which execution shall not have been taken out and levied before the expiration of five years next after its rendition, shall operate as a lien upon the estate of any debtor to the preference of any other *bona fide* judgment creditor," etc. The provisions of this section, as will be readily observed, are limited to *bona fide* judgment creditors, and have no application to purchasers during the existence of the judgment lien. Section 477 of the civil code provides that, "The lands and tenements of the debtor within the county where the judgment is entered shall be bound for the satisfaction thereof from the first day of the term at which judgment

is rendered;" and section 482 provides that, "If execution shall not be sued out within five years from the date of any judgment that now is or may hereafter be rendered in any court of record of this state, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor." By this section the judgment lien may be continued, by the issuance of an execution, for a longer time than five years, so as to be an incumbrance upon the real estate of the judgment debtor not only in his hands but also in the hands of his grantees after the judgment lien has attached; and the suing out of the execution has the same effect as the revival of the judgment. *Godman v. Boggs*, 12 Neb., 19. If then the lien of this judgment attached to this real estate upon the rendition of the judgment (sec. 477, civil code) and by the issuance of the previous executions the lien was perpetuated (sec. 482), we can see no reason why the judgment lien in this case does not operate against the grantee of the judgment debtor, as well as against himself, provided that the lien was in existence at the time of the grant.

The appellee purchased the real estate at sheriff's sale upon execution under the lien created by the judgment. By that purchase and conveyance he obtained "as good and sufficient a deed of conveyance" as the judgment debtor "could have made of the same at the time they became liable to the judgment or at any time thereafter" (sec. 499, civil code), and the estate vested in him was as good and as perfect as was vested in the judgment debtor at or after the time they became liable to the satisfaction of the judgment, which was at the time of its rendition. § 500, civil code. *Hibbard v. Weil & Kahn*, 5 Neb., 45. *Mansfield v. Gregory*, 8 Neb., 435.

The next point urged by the appellant is, that a levy

having been made upon real estate of the judgment debtor under a prior execution, and the real estate levied upon not having been sold, the judgment creditor has no right to cause a levy to be made on other property under a subsequent execution without prosecuting the first levy to a sale. In other words that the first levy was in effect a satisfaction of the judgment as against third parties. We cannot agree with appellant's counsel upon this proposition. While it is true that the return of the execution without a sale of the property levied upon would have the effect of releasing the property from that levy, and a surrender of the authority by which it was held, if the execution creditor does not seek to enforce the lien acquired by his levy, yet we think it could reach no further than this, and the judgment or the right to issue a new execution thereon would not be impaired. *Rickards v. Cunningham*, 10 Neb., 419. *Hicok v. Coates*, 2 Wend., 419. *Vroman v. Thompson*, 16 N. W. Rep., 808. *Godman v. Boggs*, 12 Neb., 19.

The appellant is charged with notice of the condition of her title at the time of her purchase, as well as with the proceedings to enforce the judgment lien as against the real estate purchased by her. She possesses no higher or greater right than would the judgment debtor if prosecuting this action for himself.

Whether or not she could have restrained the sheriff from selling this property until the property of the judgment debtor which he had not conveyed was exhausted, it is not necessary here to decide. It is apparent she did not do so, and that the rights of the purchaser can not now be questioned on that ground. The decree of the district court is therefore affirmed.

DECREE AFFIRMED.

THE other judges concur.

CHARLES MURPHY, PLAINTIFF IN ERROR, V. THE STATE
OF NEBRASKA, DEFENDANT IN ERROR.

1. **Practice in Criminal Cases: CHALLENGE OF JURORS.**

Under the provisions of the criminal code it is not error to permit a juror to sit in a cause who, although on oath, says "he had an opinion;" also says "he could render a fair and impartial verdict upon the evidence and the law;" the record disclosing that the opinion was hypothetical and not one calculated to bias the juror.

2. **Verdict: CONFLICTING TESTIMONY.** Where the testimony is conflicting, and is fairly submitted to a jury, a new trial will not be granted if the testimony is sufficient to sustain the verdict.

3. **Testimony: JURY ALONE TO JUDGE OF WEIGHT.** When conflicting testimony is submitted to a jury under proper instructions, the jurors alone are the judges of the weight of the testimony of the witnesses, and their verdict will not be set aside on that ground alone. And it is not the province of the court to establish any arbitrary standard by which they shall weigh or measure the testimony of the witnesses.

4. **Instructions: HOW CONSIDERED.** The true meaning and effect of instructions are not to be determined by the selection of detached parts thereof, but by considering all that is said on each particular subject or branch of the case. *St. Louis v. The State*, 8 Neb., 406.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Lamb, Ricketts & Wilson, for plaintiff in error.

Isaac Powers, Jr., Attorney General, and *Brown & Ryan Brothers*, for the State.

REESE, J.

The plaintiff in error was indicted and tried in the district court of Lancaster county upon the charge of having committed the crime of rape upon the person of Mrs. Julia

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15	383
30	899
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34	262
15	383
41	93
15	383
43	170
43	394
43	410
15	383
44	80
15	383
45	977
45	899
15	383
46	401
15	383
49	784
51	155
52	76
15	383
58	323
58	722

Abbott. The trial resulted in a conviction, and he brings the case into this court by petition in error.

The first question presented by him is, whether the district court erred in overruling his challenge of the juror J. B. Taylor. The testimony of this juror on his *voir dire* examination was, in substance, that he had heard of the case, and if what he had heard was true he had formed an opinion; that the source of his information was what the neighbors of a family by the name of Abbott had said to his wife, and she had told him; that the parties with whom his wife had talked were none of them witnesses in the case, and that he thought what he had heard would influence his mind a little; that it would take evidence to remove his opinion. To the inquiry of the court the juror stated that what he had heard was rumor and not by conversation with any person purporting to know the facts in the case; that it had come to him in a roundabout way, and that he had no opinion except upon the hypothesis that what he had heard was true, and that he thought he would be able to render a fair and impartial verdict upon the evidence that should be adduced on the trial and the law as given by the court, notwithstanding any opinion he might have formed.

In *Fillion v. The State*, 5 Neb., 352, it is said that, "To render a juror incompetent it must appear that the opinion formed or expressed by him was in reference to the innocence or guilt of the accused." The juror stated that he had heard of this case, and that if what he had heard was true he had formed an opinion, but there is no intimation in all the examination that the opinion of which he testified was in reference to the guilt or innocence of the plaintiff in error. The rule laid down in the case above referred to is decisive of this question. But to pursue the question further, section 468 of the criminal code provides as the second cause for challenge: "That he has formed or expressed an opinion as to the guilt or innocence of the ac-

cused; *Provided*, That if a juror shall state that he has formed or expressed an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine, on oath, such juror as to the ground of such opinion; and if it shall appear to have been founded upon reading newspaper statements, communications, comments, or reports, or upon rumor or hearsay, and not upon conversations with witnesses of the transactions, or reading reports of their testimony, or hearing them testify, and the juror shall say, upon oath, that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that such juror is impartial and will render such verdict, may, in its discretion, admit such juror as competent to serve in such case." In accordance with the provisions of this section, the trial court examined the proposed juror and found, correctly, as we think, that he was a competent juror. "It often happens that a juror may suppose that his belief in the existence of a certain fact will constitute an opinion, when in truth it may be necessary to establish a great many other facts before the guilt or innocence of the party could be established." *Curry v. The State*, 5 Neb., 416. Such was evidently the condition of this juror. He had an impression, but such a one as any intelligent person will have who hears, however remotely, a statement of the supposed facts of a case, and if upon the trial or upon a direct examination of any kind the facts should differ from those at first presented, the mind is at once freed from its first impression and adopts that which is the result of a careful investigation. It should be further remembered that all the opinion entertained by this juror was hypothetical. In *Curry v. The State*, *supra*, 415, it is said, quoting from *McCausland v. Crawford*, 1 Yeates, 378: "Prejudging and giving our opinion on a statement of certain facts are very different things. The first implies a strong disposition to favor one side or the other; a determination to find

one way, let the evidence be what it may. The last involves the truth of certain facts and propositions in the sentiments delivered; and impressions thus made may be effaced by the production of other evidence. The first renders the person incompetent as a juror; the second is an opinion only binding or influencing the juror provided the case should turn out as represented, and this is a hypothetical opinion." Such an opinion does not disqualify a juror. The evidence does not tend to show that the juror had any fixed and definite opinion as to the guilt or innocence of the plaintiff in error. Such an opinion is necessary to sustain a challenge. *Id.*, 417. Upon inquiry by the court the juror showed himself competent, under the statute, to sit in the case.

The next objection made by the plaintiff in error is, that the verdict is not supported by sufficient evidence; that the testimony of the prosecutrix, if true, does not establish the commission of the crime of rape, and that her testimony is not corroborated sufficiently to justify the finding of the verdict returned by the jury.

The evidence is conflicting and somewhat voluminous, and a critical review of it in this opinion cannot be made, but we think it is sufficient to sustain the verdict. The testimony of the prosecutrix appears to have been candidly and carefully given. Her statement of the case was, substantially, that she was at work in her room packing her trunk preparatory to her trip to her friends in Burlington, Iowa, which was to be made the next day; while so making her preparation, the plaintiff in error came into her room, her husband being absent, and made indecent proposals to her; she resented his overtures, and ordered him to leave the room; she was seventeen years of age and weighed about one hundred and twenty pounds, and until she came to this country from Germany, three years before, she had never seen a colored man, and that she had never become accustomed to them; the plaintiff in error was a colored

man, strong and athletic; when he first came into her room she was greatly frightened; he seized her, threatened her, told her if she screamed or hallooed he would kill her; she was scared and could do nothing; he took her by the arms, threw her down on the floor, and forcibly had connection with her without her consent; the plaintiff in error was at that time working for her husband, and had not prior to that day spent so much time in and about the house, and had never been in her room before; and that at the time of the commission of the offense there was no other person about the house; she was married to her husband on the fourteenth of June, and this occurred on the twenty-fourth of the following July.

The plaintiff in error denies a part of the facts testified to by her, but admits the sexual intercourse at the time and place and under the circumstances described by her; the only material difference in their testimony being the assertion by him that the intercourse was with her consent.

While it is true as claimed by the plaintiff in error that no forced or unnatural construction should be put upon the evidence of the prosecutrix in order to sustain a conviction, it being natural that the prosecutrix should seek to exonerate herself by throwing all the blame upon the plaintiff in error, yet the jury were justified in giving to her testimony a natural, reasonable construction, and to give it such weight in comparison with the testimony of the plaintiff in error as they thought right. It is true the father of her husband was in an adjacent field at work, and she made no outcry and no complaint to her husband on his return home that evening, and that she allowed the plaintiff in error to drive her to the railroad station the next morning, but it is also true, as testified by her and shown by the circumstances in the case, that the friendship of the father-in-law was at that time very questionable as she well knew, and that both the husband and father-in-law had given her to understand that she must return to

Burlington. That neither were friendly to her. That the husband had informed her on the morning of her departure that his father would take her to the train, and after his departure the father-in-law put the trunk into the wagon, and told the plaintiff in error to take her. That the plaintiff in error had, immediately after the intercourse, made threats to her as to what the result would be if she informed on him. That she had no friend or adviser nearer than Burlington, and no one to whom she could apply for assistance of any kind, and that she was without means—her husband furnishing her with a ticket to the end of her journey, but no money. It is difficult to see what other course was left to her to pursue than the one she adopted. Upon her arrival at Burlington, she immediately made complaint to those with whom she was acquainted, and the prosecution followed soon after.

The questions of fact are very much narrowed by the testimony of the plaintiff in error, who simply denies the *force* by which the intercourse was had. He admits the commission of a crime, being a married man, but says it was not *the* crime with which he is charged, although one involving an equal degree of moral turpitude. The prosecutrix denies being guilty of any crime, and from all the facts and circumstances in the case, we think the jury were warranted in adopting the theory of the case as presented by her testimony.

It is contended by the plaintiff in error that the testimony of the physicians shows that a rape upon the prosecutrix would have been necessarily followed by an abortion, she being at that time pregnant of from four to five weeks duration. It is only necessary to say that the testimony on that branch of the case was conflicting and was fairly submitted to the jury, and their verdict upon that point must be final.

The plaintiff in error requested the court to instruct the jury as follows:

Murphy v. State.

"You are instructed that the evidence of the defendant himself is not to be disregarded because he is on trial for a crime—a defendant in a criminal prosecution is ordinarily entitled to the same credit as a party in an important civil suit." This instruction was refused, and we think properly so. While it is true that a defendant's testimony is not to be arbitrarily disregarded by the jury, yet it is equally true that no standard by which to weigh or measure the testimony of witnesses can be established by the court. The jury were instructed as to the legal rules to be observed in weighing his testimony, and by those instructions the plaintiff in error was placed on the same level with the prosecutrix and other witnesses in the case. Of this the plaintiff in error cannot complain. It would have been proper for the court to have instructed the jury that in weighing his testimony they should consider his interest in the result of the trial. *St. Louis v. The State*, 8 Neb., 418.

Objection is made to the eleventh instruction given by the court on request of the state. The objectionable part is in this language: "Starting, then, with the presumption of innocence, have the people convinced you that the defendant is guilty of the crime charged? If they have, your verdict will of course be, guilty." It is claimed that this permitted the jury to find him guilty on a mere preponderance of evidence. Without further reference to this language, it is enough to say that the jury were fully charged by the court, on its own motion, as to the degree of certainty required before a conviction could be had, the doctrine of "reasonable doubt" being fully and clearly explained. The whole of the instructions must be construed together. "The true meaning and effect of a charge to a jury cannot be ascertained by selecting a sentence here and a line or a word there, and looking to them alone, but all that is said on each particular subject or branch of the case must be looked to in order to reach a just conclusion respecting it." *St. Louis v. The State*, 8 Neb., 418. This

will sufficiently dispose of all the objections to the instructions given upon the trial. The objections are sufficiently met by the instructions when taken as a whole.

We have tried to give the record in this case a careful examination, and while the testimony on the question of the consent of the prosecutrix is conflicting, yet the case has been fairly submitted to the jury, and there is sufficient to support the verdict. In *Palmer v. The People*, 4 Neb., 76, it is said, "So much depends on the manner and appearance of a witness while giving his testimony that the question of his credibility must be left to the jury, and a reviewing court will not, in such a case, say from an examination of the testimony that the verdict is erroneous."

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

15 890
18 808

THE BURLINGTON AND MISSOURI RIVER RAILROAD
COMPANY IN NEBRASKA, PLAINTIFF IN ERROR, V.
THE CHICAGO LUMBER COMPANY, DEFENDANT IN
ERROR.

1. **Railroad: DEMURRAGE.** A railroad company is not entitled to charge demurrage for freight standing in its cars, unless by virtue of contract or statutory law, or possibly by such use and custom as may have acquired the force of law.
2. ———: **EXPENSE: UNLOADING FREIGHT.** A railroad company cannot collect charges for unloading freight which it converts to its own use at the time of such unloading.
3. ———: **COMMON CARRIER: INCREASE OF CHARGES FOR TRANSPORTATION.** A railroad company, as a common carrier, cannot legally increase the charges for transportation by wrongfully diverting freight from its proper course in transit.

4. **Practice:** PREJUDICIAL ERROR MUST APPEAR. A new trial will not be ordered unless prejudicial error is shown by the record.

ERROR to the district court for Otoe county. Tried below before POUND, J.

J. L. Mitchell and *Marquett & Deweese*, for plaintiff in error, argued the cause on the facts alone.

Watson & Wodehouse, for defendant in error, cited: *Hutchinson Carriers*, §§ 473, 474, 478. *Adams v. Scott*, 104 Mass., 164. *Gage v. Morse*, 12 Allen, 410. *Crommelin v. Railroad*, 4 Keyes, 90. *Young v. Mceller*, 5 Ellis & B., 589.

REESE, J.

This is an action in garnishment commenced in the district court of Otoe county by the defendant in error, a judgment creditor of one William W. Babbitt, against the plaintiff in error, as a supposed debtor of the said Babbitt.

The answer of the plaintiff in error discloses the fact that at the time of the service of the summons in garnishment it was indebted to the said Babbitt in the sum of \$144.51 for overcharges, before that time made, on freight. Said answer discloses the further fact that it had in its possession at said time one hundred and fifty-three tons and fourteen hundred pounds of coal (eleven carloads) consigned to the said Babbitt, and worth, as it alleges, four dollars per ton, amounting to \$616.10; but it further alleges that its charges against said coal amount to the sum of \$1,029.63, which it itemizes as follows: Freight and back charges, \$666.63; demurrage, eighty-five days in car, \$330; unloading coal, \$33; being \$413.52 more than the alleged value of the coal. The plaintiff in error therefore insists it was not indebted to said Babbitt in any amount.

It is shown by the evidence in the trial of the cause that

at the time of the unloading of the coal by the plaintiff in error, it converted it to its own use, unloading it into its own bins.

The finding of the district court was in accordance with the above facts, and judgment was rendered against the plaintiff in error, and in favor of the defendant in error, for the said sum of \$144.51. Both parties excepted to the ruling of the court, but the plaintiff in error, only, brings the case into this court by petition in error, alleging that the court erred in rendering judgment against it, for the reason that the judgment is contrary to law, and contrary to and inconsistent with the findings of fact by the court; also in not discharging the plaintiff in error without liability as garnishee.

According to our view of the case, it will not be necessary to examine the alleged errors separately, as we can best present our conclusions by grouping all together. But before doing so it is proper to note the fact that the defendant in error in the course of the trial offered testimony to prove that the coal was worth \$8 per ton instead of \$4 as claimed by plaintiff in error, but upon objection by plaintiff the offer was overruled by the court and the evidence excluded. This ruling must have been made upon the theory that the whole matter of the eleven carloads of coal should be left out of the question, and the findings of the court upon that subject were not intended in any respect as a basis for the judgment. In this we think the district court was correct, at least if the court did err it was against the defendant in error and not the plaintiff.

The plaintiff in error concedes in its brief that the freight charges were more than the value of the coal, but seeks to explain that fact by saying "the coal was wrongfully turned in transit from its proper course; it should have come over the Council Bluffs and St. Joe Railroad, and it was turned and went the roundabout way, meeting with several wash-

outs which caused the freight to be more than the coal." This explanation we think will hardly meet the case. We know of no rule of law which will permit railroad companies, as common carriers, to "wrongfully" send freight by a "roundabout" way, instead of over its direct lines, and thus increase the cost of transportation. While this course might be instrumental in increasing the revenues of the carrier, it would be very injurious to the commerce of the country, which requires not only cheap but direct and rapid transportation.

To these charges for freight was added another burdensome charge, that of demurrage. It is claimed by the plaintiff that this freight was allowed to stand in its cars in all eighty-five days, *i.e.* equivalent to one car that number of days, and for this it charges \$380. It is not claimed that this charge was made by virtue of any contract between the shipper and the carrier, nor yet by any statutory enactment permitting it, or by any use or custom which may possibly have acquired the force of law. And we are unable to see how any such charge can be insisted upon in this action. We know of no authority for it, and our attention has been called to none.

In *Chicago and North Western Ry. Company v. Jenkins*, 103 Ill., 588, it is decided that the right to demurrage does not attach to carriers by railroads. If it exists at all, as a legal right, it exists only as to carriers by sea-going vessels, and is confined to maritime law. As to whether demurrage might be charged in case of a contract to that effect we express no opinion, but that it cannot be allowed in this case we have no doubt.

The charge of \$33 for unloading the coal is equally objectionable. The proof shows that the plaintiff in error unloaded the coal into its own bins for its own use. There is no claim that it cost any more to unload *this* coal than it would had it belonged to the plaintiff in error in the first instance. Why should it charge for doing with this

coal the same as it would have had to do with its own? We can see no reason for such charge, and it should not be allowed.

From the foregoing we are led to the conclusion that the district court did not err, as against the plaintiff in error in the judgment rendered; that if its judgment was erroneous the defendant in error is the only sufferer thereby, but as it is not seeking any relief at the hands of this court the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

15 394
28 615

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, PLAINTIFF IN ERROR, V. J. PAINTER & SONS, DEFENDANTS IN ERROR.

1. **Stoppage in Transitu: CONTINUANCE OF RIGHT.** The right of stoppage in transitu by the vendor continues until the goods have reached the buyer and the delivery is complete.
2. ———: **RIGHT NOT EXTINGUISHED BY GARNISHMENT OF CARRIER.** The right of stoppage in transitu is not impaired or extinguished by service of process of garnishment upon the carrier.
3. **Garnishment, no Defense.** The fact that a common carrier has been garnished by a creditor of an insolvent debtor to whom property is consigned, is no defense to an action of replevin, by the vendor, who has given notice to the carrier and demanded the goods.

ERROR to the district court for Otoe county. Tried below before POUND, J.

J. L. Mitchell and *Marquett & Deweese*, for plaintiff in error.

Defendants offered to show that they had been garnished on the 13th of June, and that no claim was laid to the goods until the 25th; and offered the proceedings in garnishment, which was ruled out by the court. This we think is clearly error, as it would have tended to prove that the defendants in error had not claimed the goods in transitu. The mere fact that after the creditors had seized upon the goods, and William M. Babbitt refused to accept them, would not make any difference. The court erred in ruling out the evidence, as appears on record, for it had some tendency to prove the issues.

F. P. Ireland and Watson & Wodehouse, for defendant in error, cited: *Naylor v. Dennie*, 19 Am. Dec., 319. *Rucker v. Donovan*, 13 Kan., 251. *Wood v. Yeatman*, 15 B. Mon., 270. *Seymour v. Newton*, 105 Mass., 372. *Covell v. Hitchcock*, 23 Wend., 611. *Kitchen v. Spear*, 30 Vt., 545. 16 Cent. Law Journal, 82.

REESE, J.

There is but one question presented by the record in this case, and that is whether the right of stoppage *in transitu*, belonging to a vendor of goods, on credit, can be extinguished by the service of garnishee process upon the carrier before the delivery of the goods to the consignee.

The defendants in error, doing business in Pittsburg, Penn., sold and consigned to the Nebraska Distilling Company, at Nebraska City, certain merchandise, which was transported through the state of Iowa over the line of railroad belonging to the defendant in error. Before the arrival of the goods at their destination the consignee became insolvent, and the goods were not delivered, nor was the freight paid. While the goods were in the possession of the plaintiff in error, the Murray Iron Works Company instituted attachment proceedings in the circuit court

of Des Moines county (at Burlington), Iowa, against the Nebraska Distilling Company, and caused notice of garnishment to be served upon the plaintiff in error as a supposed debtor of the defendant in said cause. Afterwards, but before the answer of the garnishee, the defendants in error served notice on the plaintiff in error that they claimed the right of stoppage *in transitu*, and demanded the goods. The demand being refused, this action in replevin was commenced, the goods replevied and delivered to the defendant in error.

On the trial of the cause in the district court, the plaintiff in error offered in evidence a certified transcript of the proceedings in the lower court, which, upon objection, was excluded and the proper exception taken. This ruling is now assigned for error.

The law is well settled that the right of stoppage *in transitu* arises upon the discovery, by a vendor after sale on credit, of the insolvency of the vendee, and the right continues until the goods have reached the vendee and the delivery to him or his agent is complete. *Hutchinson on Carriers*, § 499. *O'Niel v. Garrett*, 6 Iowa, 479. *Callahan v. Babcock*, 21 O. S., 281. *Reynolds v. Boston & Maine R. R. Co.*, 43 N. H., 580. *Sutro v. Hoile*, 2 Neb., 186. 2 Redfield on Railways, 132. This right is based upon the just and equitable rule of law that the property of one man shall not be taken to pay another man's debts, and is recognized in all civilized countries.

We think it is equally well settled that this right cannot be impaired or extinguished during its existence by the acts or interference of a third party, but will follow the goods and attach to them. Hence, it is held that the seizure of such goods by an officer under legal process in favor of some other creditor does not destroy the right, but that the vendor may follow the officer and retake the goods. *Ruskin v. Donovan*, 13 Kas., 251. *Greve & Co. v. Dunham*, 14 N. W. Rep., 130 (Iowa).

Dorrington v. Minnick.

In the case of *O'Niel v. Garret, supra*, the court says: "As to the effect of the levy upon the goods by the defendant Garret, as sheriff, by virtue of an attachment at the suit of a creditor of Holmes, there can be no doubt but that the plaintiff's right as vendor is not divested by the levy before the goods came into the possession of the buyer. The plaintiff has the preference over the legal process of a general creditor, although but for the suit they would have fallen into the hands of the vendee." In support of which the court cites the following cases: *Covell v. Hitchcock*, 23 Wend., 611. *Buckley v. Furness*, 15 Wend., 137. *Naylor v. Dennie*, 8 Pick., 198. *Sawyer v. Joslin*, 20 Ver., 172. *House v. Judson*, 4 Dana, 11. *Cox v. Burns*, 1 Iowa, 64.

If the right of stoppage continues until delivery of the goods, and a levy thereon does not divest this right, it seems clear, on principle, that the right of the vendor cannot be impaired or extinguished by the garnishment of the carrier, for the process of garnishment can have no greater force than the levying upon the goods, as it is simply one of the methods of reaching the property of the debtor in the possession of a third party, which cannot be reached by the ordinary levy and seizure.

The ruling of the district court being, in our opinion, correct, the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

GEORGE E. DORRINGTON ET AL., APPELLEES, V. JOHN
W. MINNICK ET AL., APPELLANTS.

1. **Practice: WAIVER OF EXCEPTION.** If a defendant, after the overruling of a demurrer, answer to the merits, he thereby waives his exception to the ruling of the court on such demurrer. *Haral v. Gray*, 10 Neb., 186.

15	397
17	595
19	148
15	397
27	70
15	397
30	316
31	120
32	289
15	397
34	658
34	718
15	397
52	135

2. **Attachment: AFFIDAVIT: NOT NECESSARY TO FULLY SET OUT FACTS CONSTITUTING THE PLAINTIFF'S CAUSE OF ACTION.** In stating "the nature of the plaintiff's cause of action" in an affidavit for an attachment, it is not necessary to state the facts constituting the cause of action; a condensed statement of the general nature of the claim is a sufficient compliance with the requirements of section 189 of the code of civil procedure.
3. **Bill of Exceptions: AFFIDAVITS.** Affidavits used on a hearing in the district court must be preserved by a bill of exceptions in order to be considered by the supreme court. *Aultman v. Howe*, 10 Neb., 8.
4. **Guaranty: WHEN ACTION ACCRUES.** When an affirmative contract is made upon sufficient consideration to pay a debt of the promisee, upon the failure of the promisor to comply with his contract, the promisee may have his action at once without proof of damnification. Such a contract distinguished from a contract of indemnity.
5. **Fraud.** Facts considered and *Held* To be proof of fraudulent intent.

APPEAL from the district court of Richardson county.
Tried below before DAVIDSON, J.

Martin & Gilman, for appellants.

Isham Reavis and *E. W. Thomas*, for appellees.

REESE, J.

This is an equity case, brought to this court by the defendants on an appeal from the district court of Richardson county. The uncontroverted facts of the case are as follows:

On and prior to the sixth day of March, 1882, the plaintiffs, George E. Dorrington and William E. Dorrington, were engaged in the merchandising business in Falls City, under the firm name of Dorrington Brothers, with a stock of goods claimed by them to be of the value of \$6,143.61, and on which there was an indebtedness of \$4,767.90.

On that day, W. E. Dorrington sold his interest in the

business to the defendant John W. Minnick for \$3,071.80, said Minnick assuming the payment of one-half the indebtedness of the firm and paying to W. E. Dorrington the remainder of the purchase price, to-wit, \$687. The plaintiff George E. Dorrington and the defendant Minnick then formed a copartnership under the firm name of Dorrington & Minnick, and continued the business under that name until about the twenty-second day of April, 1882, when George E. Dorrington sold his interest in the business to Minnick, Minnick assuming the payment of all the debts of the old firm of Dorrington Brothers and of the firm of Dorrington & Minnick. Minnick continued in business until about the eighth day of May, 1882, when he sold the stock of goods to the defendants Collins & Brannin for the sum of \$4,000, \$1,000 of which was paid in cash, and \$3,000 in three notes of \$1,000 each, payable to the wife of Minnick. Thereupon Collins & Brannin took possession of the store and goods. On the tenth day of May, 1882, the plaintiffs commenced this action, and in their petition alleged the foregoing facts, setting out the names of the creditors, alleging that Minnick undertook and agreed to pay all of said indebtedness, that Minnick thereby became the principal debtor, that by operation of law the plaintiffs became his surety for the payment thereof. That a part of said indebtedness had been paid by Minnick, and Dorrington & Minnick, but that \$2,425.50 of said indebtedness remained unpaid, that Minnick had received the possession of said goods charged with the payment of said indebtedness, the goods to be sold by Minnick in the usual course of trade, and the proceeds to be applied as fast as received, first, to the payment of the debts of Dorrington Brothers, and secondly, to the debts of Dorrington & Minnick. That the defendants, Minnick and Collins & Brannin, on the eighth day of May, 1882, did confederate and combine together to hinder, delay, and defraud said creditors and the plaintiffs, and that the pretended sale and

Dorrington v. Minnick.

transfer of the stock of goods to Collins & Brannin was fraudulent and void as against said creditors and the plaintiffs. The creditors were all made parties defendant, and the plaintiffs pray that an accounting may be had, the sale to Collins & Brannin be declared void, the amount due the creditors ascertained, judgment rendered for plaintiffs for the amount thus found due, and that all parties be restored to their original rights. At the same time the plaintiffs filed an affidavit for an order of attachment, as against Minnick, alleging as ground therefor the fraudulent disposal of his property. An order of attachment was issued and the stock of goods levied upon.

The defendants, Minnick and Collins & Brannin, appeared, and each demurred to the petition. The demurrers were overruled, and the ruling of the court on these demurrers is now assigned for error. The defendants, after the overruling of the demurrers, answered to the merits, and thereby waived this exception. *Mills v. Miller*, 2 Neb., 308. *Pottinger v. Garrison*, 3 Neb., 223. *Harral v. Gray*, 10 Neb., 188.

The defendant, Minnick, also filed his motion to discharge the attachment, alleging two reasons therefor—1st, "Because the facts stated in said plaintiff's affidavit are not sufficient to justify the issuance of the writ;" and 2d, "Because the statements of fact in said affidavit are not true but are wholly false." Defendant insists that the nature of the plaintiffs' claim is not sufficiently stated in the affidavit for attachment, that it is ambiguous and uncertain. Before an order of attachment can be issued the statute (civil code, § 191) requires an affidavit to be filed showing, among other things, "the nature of the plaintiff's claim." The affidavit in this case states the nature of plaintiffs' claim to be for "the sum of \$2,425.58, now due and payable to the plaintiffs from the said defendant for breach of contract to pay indebtedness of the partnership firm of Dorrington Brothers, plaintiffs herein, which in-

debtedness said Minnick had assumed and promised to pay." This is a sufficient compliance with the statute.

The second reason alleged in the motion we cannot consider, for the reason that none of the proofs taken by affidavits in support of or against the motion are preserved in the record. There are copies of affidavits attached to the record, which we presume were filed by the defendant in support of his motion, but none purporting to have been filed by the plaintiff. There is no bill of exceptions showing for what purpose those affidavits were filed, nor whether any others were filed. It is well settled by this court that such affidavits can only be made a part of the record by being embodied in a bill of exceptions. *Oliver v. Sheeley*, 11 Neb., 522. *Aullman v. Howe*, 10 Neb., 10.

The defendants Collins & Brennin answered denying each and every allegation contained in the petition. The defendant Minnick answered, admitting the purchase of the goods from the plaintiffs, but denying any lien or reservation of title in their favor, or that the proceeds coming from the sale of the goods were to be applied to the payment of their indebtedness, and alleging that in the sale of the goods by the plaintiffs to him the plaintiffs fraudulently represented the property to be worth about \$2,000 more than it was in fact worth. The plaintiffs knew him to be without experience or knowledge with reference to the value or marketable quality of the goods; that he bought them of the plaintiffs at the original cost, the price to be taken from the cost mark on the goods; that the plaintiffs represented the goods to be of good merchantable quality; that they were of the cash value of \$6,143.60, when in fact they were not worth over \$4,000, and were not of such quality as to be adapted to the market; that the defendant relied upon the representations so made by the plaintiffs, and, so relying, purchased the goods.

It will be observed that the defendant does not seek to rescind the contract, nor does he present any counter-claim

or set-off. He asks no relief from the contract, and alleges no damages.

The plaintiffs, for reply to Minnick's answer, deny the facts alleged, and say the answer states no facts which constitute a defense. The cause was tried to the court, and resulted in a general finding for the plaintiffs, and that there is due plaintiffs the sum of \$2,582, that the sale from Minnick to Collins and Brannin was fraudulent, that Minnick was heavily in debt, and that Collins and Brannin had sufficient notice of the facts showing fraudulent intent on the part of Minnick to put them on inquiry, which inquiry, if reasonably pursued, would have disclosed to them such fraudulent intent, and rendered judgment in favor of the plaintiffs and against the defendant Minnick for the amount found due; that the sale be set aside, the property sold, the proceeds applied to the satisfaction of the judgment, and that the defendant Minnick be allowed to pay the amounts found due to the creditors *pro rata* in satisfaction of the judgment.

The defendant insists that the finding and decree of the district court should be reversed, and the cause dismissed as to Collins and Brannin. As we view the case, the reasons insisted upon may be stated briefly as follows: 1st, The plaintiffs' petition and the facts proved do not show that the plaintiffs are entitled to any relief. 2d, The proofs do not show any fraudulent intent either upon the part of Minnick or Collins and Brannin. As to the first proposition, we think the petition states a cause of action, and that if the facts alleged therein are true, the plaintiffs would be entitled to the relief prayed for and given by the trial court. It is alleged in the petition that the contract of Minnick was a direct agreement on his part to pay the debts of the firm of Dorrington Brothers, and that he has failed to do so. A copy of the written contract is alleged to be attached to the petition as an exhibit, and we find the same contract referred to in the evidence as introduced,

but we fail to find any such contract in the record of the case, either as an exhibit to the petition or in the evidence adduced on the trial; and as the appellant has failed to cause a copy to be embodied in the record, we conclude it is as alleged in plaintiffs' petition.

In the case of *Wilson v. Stilwell*, 9 Ohio State, 470, it is said: "The doctrine seems to be now well established by a current of decisions both in this country and in England that if there be a contract to indemnify simply, and nothing more, then damage must be shown before the party indemnified is entitled to recover; but if there be an affirmative contract to do a certain act, or to pay a certain sum or sums of money, then it is no defense to say that the plaintiff has not been damnified; and that the measure of damages in such case is the amount agreed to be paid, or the proper expense of doing the act agreed to be done." And the cases of *Post v. Jackson*, 17 Johns., 239; S. C. in error Ib., 479; *Mann v. Exford's Ex'rs*, 15 Wend., 502; *Ex parte Negus*, 7 Wend., 499; *Loosemore v. Radford*, 9 Mees. & W., 657; *Lathrop v. Atwood*, 21 Conn., 117, are cited by the court in support of its decision. Such being the law, it is clear that it was not necessary for the plaintiffs to pay the creditors before bringing this action.

As to the second proposition, we are not so free from doubt; but from a careful examination of the evidence, we think the finding and judgment of the district court should be sustained. It is true the testimony is conflicting; but in view of all the circumstances, we think the decision of the court is correct.

The testimony in the case is quite voluminous, and cannot be given in this opinion, but we think it may be fairly summarized as follows: Prior to the sale by Minnick to Collins & Brannin, Brannin was doing business in the same city as a general merchant; Collins was, for the time, out of business; Minnick was deeply involved in debt, \$1,800 of which he claims was due to his wife. For about

a week prior to the sale, Collins was in the store clerking for Minnick, and another clerk was discharged. Both Collins and Brannin knew of Minnick's embarrassment, and that he would have to sell, for Minnick testifies he so informed them. But they claim they did not know the amount of his indebtedness. On the day of the sale some of Minnick's creditors were at his store demanding their money. Minnick went to Brannin's store, and there the trade was made. From there they went to the office of an attorney, and Collins and Brannin paid Minnick \$1,000 by a check on the bank, and executed three notes for \$1,000 each, due in six, twelve, and eighteen months, payable to Minnick's wife; whereupon Collins & Brannin were placed in possession of the store, which, during the time, had been under the charge of Minnick's clerk. It is claimed by Minnick, Collins, Brannin, and the attorney who wrote the notes that the writing of the name of Miranda Minnick as payee of the notes was not intended, or rather, that the attorney, having been some months before counseled as to the rights of Mrs. Minnick, inadvertently wrote her name in the notes, and the mistake was not discovered by either of the other parties. Collins and Brannin would hardly have executed notes amounting to \$3,000 without knowing their contents either by reading or hearing them read. If their version is true, it shows a degree of carelessness hardly consistent with the idea of a *bona fide* transaction.

It is a well settled rule of law that a proof of fraudulent intent on the part of the purchaser is not necessary if it be shown that he knew of the fraudulent intent of the seller, or had notice of such facts as would have put a man of ordinary prudence upon inquiry, which, made with ordinary diligence, would have led to a knowledge of the fraudulent purpose or intent of the seller. *Jones v. Hetherington*, 45 Iowa, 682. And we think the facts then known by Collins & Brannin were sufficient to have put them upon inquiry.

Dolen v. State.

Substantial justice having been done in the case the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JAMES DOLEN, PLAINTIFF IN ERROR, V. THE STATE OF
NEBRASKA, DEFENDANT IN ERROR.

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17	595
19	148
15	405
30	557
31	120
32	280
15	405
62	131

1. **Affidavits** in support of a motion for a new trial which are not embodied in the bill of exceptions, will not be considered by the supreme court.
2. **Motion for New Trial.** The supreme court will not consider questions occurring on the trial of a cause that have not been presented to the trial court by a motion for a new trial.

ERROR to the district court for Gage county. Tried below before WEAVER, J.

Colby & Hazlett, for plaintiff in error.

Isaac Powers, Jr., Attorney General, for defendant in error.

REESE, J.

At the April term, 1882, of the district court of Gage county an indictment was found against the plaintiff in error, who was a saloon keeper in Beatrice, charging him with unlawfully keeping the windows and doors of his place of business obstructed by a certain article known as ground glass. [Comp. Stat., § 29, chap. 50.] To this indictment the plaintiff in error plead "not guilty," and upon trial to a jury a verdict of guilty was rendered.

A motion for a new trial was made and overruled, and a judgment entered fining the plaintiff in error twenty-five dollars. The case is brought into this court by petition in error.

The motion for a new trial is based solely on the ground of misconduct of the district attorney in directing the clerk of the court to call a certain juror (of the regular panel) while the jury was being impaneled. We find attached to the transcript the affidavit of a member of the bar of said county supporting said motion, and the affidavits of the district attorney and the clerk of the court fully disproving said charge. So that were the question submitted to this court we would have to decide that the motion for a new trial was properly overruled. But there is nothing to show that these affidavits were ever submitted to the trial court, as they are not embodied in the bill of exceptions and cannot be considered here. *Ray v. Mason*, 6 Neb., 101. *Credit Foncier v. Rogers*, 8 Neb., 34. *Aultman v. Howe*, 10 Neb., 8. *Oliver v. Sheeley*, 11 Neb., 521.

Other objections are urged by the plaintiff in error in his brief, but as none of them were presented to the trial court they cannot be considered here. *Birdsall v. Carter*, 11 Neb., 143.

We have examined the case with care and find the verdict of the jury fully sustained by the evidence. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

WILLIAM COLEMAN, PLAINTIFF IN ERROR, V. ALEXANDER RIRIE, DEFENDANT IN ERROR.

Practice. This case presents no question of law, and turning on a question of fact upon which there was conflicting testimony, the verdict and judgment will not be disturbed.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Smith & Beeson, for plaintiff in error.

A. W. Field, for defendant in error.

COBB, CH. J.

This action was brought in the court below by the defendant in error against the plaintiff in error for the alleged want of proper care of a certain mule belonging to the defendant in error, hired to and used by the plaintiff in error, by which alleged carelessness and negligence the said mule became involved in a sudden rise of Salt creek, and being blind was unable to extricate himself and was drowned.

There is considerable evidence tending to prove the hiring of the said mule; its use by the plaintiff in error for a time; its being turned by him into a pasture partly inclosed by Salt creek, and also tending to prove that the turning of such an animal into that pasture at that time was an act of carelessness and negligence. There is also some testimony tending to prove that the bailment on the part of the said plaintiff in error of the mule in question had terminated; and that its loss was occasioned by the contributory negligence of the defendant in error in not taking the mule away and placing it in a secure pasture. All of this evidence was received without objection on

Merriam v. Otoe County.

either part, and was fairly submitted to the jury by instructions on the part of the court mutually agreed upon by the parties.

While the jury would probably have been justified in reaching a conclusion adverse to that which they did reach, yet we cannot say that their conclusion is unsustained by the evidence, it being a case quite evenly balanced as between the two parties.

There is no question of law involved, nor any reason which would justify this court in disturbing the verdict and judgment. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

15	408
16	223
15	408
33	726
15	408
62	546

SELDEN N. MERRIAM, PLAINTIFF IN ERROR, v. THE
COUNTY OF OTOE, ETC., DEFENDANT IN ERROR.

1. **Taxes: VOID SALE: LIABILITY OF COUNTY.** Under the provisions of section 71 of the revenue law (Gen. Stat., 924), it is only when by such mistakes or wrongful acts of the treasurer or other officer as are not matter of record nor which are participated in by the purchaser, land has been sold contrary to the provisions of said act, that the county is to save the purchaser harmless.
2. ———: **TITLE OF PURCHASER: STATUTE OF LIMITATIONS.** The title acquired by a purchaser at tax sale might be said to fail when it should be pronounced invalid by the judgment or decree of a court of competent jurisdiction over the subject matter. *Pett v. O'Brien*, 5 Neb., 360. And when such title has failed by reason of the land having been sold contrary to the provisions of the revenue law, "by mistake or wrongful act of the treasurer or other officer," it is then that the statute of limitations commences to run against the purchaser and in favor of the county.

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ERROR to the district court for Otoe county. Heard below before POUND, J.

Covell & Ransom, for plaintiff in error, cited: *Scott v. Tyler*, 14 Baird, 202. *Aberdeen v. Blackmar*, 6 Hill, 324. *Campbell v. Jones*, 4 Wend., 306.

Watson & Wodehouse, for defendant in error.

COBB, CH. J.

Plaintiff brought his action in the court below under the provisions of section 71 of the old revenue law (Gen. Stat., 924). His petition contains two causes of action, in each of which he alleges the purchase by him from the county treasurer of Otoe county in his official capacity on the 4th day of January, 1878, of different and specified tracts of land situate in said county for delinquent taxes of 1876, and the payment to him of the taxes on said tracts of land for the several years therein specified; that said lands were in each case wrongfully sold to said plaintiff for the non-payment of the taxes aforesaid, and were sold contrary to the provisions of the revenue law of this state then in force, because a part of the said taxes for which said lands were sold was a land road tax; so called, levied by the county commissioners upon said lands at the rate of four dollars upon each quarter section, without regard to valuation or assessment; that in the one case, one John Warden was the owner and occupant of said tract of land at the time of the sale and the several levies and other proceedings therein involved, and to whom the said lands were, for each of the years involved, assessed, and that he, the said John Warden, had at all times and was the owner of sufficient personal property upon said land out of which the said taxes could have been collected by the seizure and sale thereof by the then treasurer of said county; that the county treasurer of said county did not give the notice of

the public sale of said lands as required by law; that the said treasurer did not make a return to the clerk of said county on or before the first Monday following the sale of real property in said county for non-payment of taxes for the years 1876 and 1877, did not deposit with the county clerk a copy of the notice of sale, etc., with a certificate showing that said property was not sold for want of bidders; that the assessors for the said years did not take and subscribe the oath required by law, and did not make a return of such assessment to the county clerk with the oath attached thereto; that on the 27th day of October, 1879, the said John Warden commenced an action in the said court against said plaintiff and Nathan L. Simpson, county treasurer of said county, for the purpose of having the said court by decree declare said taxes illegal and void because of the errors and omissions of the said officers aforesaid, and restrain the issuing of a tax deed on said pretended sale, and to cancel and set aside said sale; that such proceedings were had in the said action, that at the December term, 1879, of said court a decree was therein entered declaring the said sale void for the reasons aforesaid, and canceling said sale and tax certificates and taxes, and the title of the said John Warden in and to the said lands quieted; that in the other case, one John Dunbar was, and for and during all the time involved, had been the owner and occupant of said land; that at all times the said John Dunbar had and owned on said land sufficient personal property out of which the said taxes could have been made by distraint and sale in the manner required by law; nor did the treasurer offer said land at public sale, and make return that said land had been offered for sale and not sold for want of bidders; that said treasurer did not return said land to the county clerk's office after the pretended sale to plaintiff; that the said land was not advertised for sale in the manner required by law, nor was any proof thereof filed in the county clerk's office that said land was not sold

to the person who would pay said taxes for the least quantity; said land was not sold for all the taxes due, delinquent, and unpaid at the time of the sale; there was no oath attached to the assessment rolls by the assessors of the precincts wherein said property is situated for said years; that the said assessors did not take and subscribe the oath required by law; the county commissioners of said county, on the 3d day of July, 1876, pretended to levy a land road tax of four dollars on each 160 acres of said land; that on the 27th day of August, 1879, the said John Dunbar commenced an action in the said court, wherein said Dunbar was plaintiff and this plaintiff and said Simpson, as treasurer of said county of Otoe, were defendants—the object of said suit was to obtain a decree of said court, canceling and setting aside said sale, and declaring the same illegal and void, and quieting the title to said land in the said John Dunbar, etc., and to obtain an injunction restraining the said Simpson, as such treasurer, from issuing a deed to the plaintiff on the said sale; that upon a proper application, the said last mentioned suit was removed to the circuit court of the United States for the proper district; that such proceedings were had in said last mentioned court; that on the 7th day of May, 1881, a decree was rendered in said cause, setting aside said sale of said land for said taxes, and declaring the same illegal and void; setting aside said certificates, and declaring them illegal, except that the court retained said cause for an accounting of the amount due the plaintiff, Selden N. Merriam, for legal taxes and interest at 12 per cent per annum, and awarded said Merriam a claim and lien therefor on said land to the extent and amount of \$1,223.13, and thereupon said court by its decree set aside the said taxes, tax sales, and tax certificates, and ordered the said John Dunbar to pay into court the said sum of money for the use of plaintiff, and in default of such payment, ordered the said lands to be sold to pay the said sum with interest, and also declared the said sale

to have been made contrary to the provisions of the revenue laws. Plaintiff further alleged, that because of the levy of the land road tax aforesaid, because of the failure of the assessors to attach the proper oaths to their assessment rolls in the precincts where the lands are situated, because of the failure of the treasurer of said county to give the proper notice of the sale of lands for taxes of the year 1870, because of the failure of the treasurer to make the proper return that the said lands had been offered at public sale and not sold for the want of bidders, and because there was no attempt made by the county treasurer to collect said taxes out of the personal property of the said John Dunbar, the said sale was illegal, and was made by the wrongful acts of the revenue officers above mentioned; that by reason of the facts above set forth, said land was wrongfully sold to plaintiff, and that had said land been rightfully sold to plaintiff, he would have been entitled on the 7th day of May, 1881, the date on which said decree was rendered in said circuit court, to the full sum of \$1,907.26, exclusive of what was due him for the sum of \$264.95 paid for taxes of 1870; and plaintiff alleges, that because the said land had been sold as aforesaid, and because of the wrongful acts aforesaid, he received only the said sum of \$1,223.13, losing thereby the said sum of \$679.13, and also the amount of money which he paid for the taxes of 1870; that said tax of 1870 had been paid by the said John Dunbar long prior to the date of the sale to the plaintiff, and that the treasurer omitted to so mark the same on the tax list, and that by reason thereof, the same was again collected of plaintiff, amounting to the sum of \$264.95; and had it not been that said tax had been so paid, plaintiff would, on the 7th day of May, 1881, have been entitled to the further sum of \$617.11, when in fact he received nothing therefor; that because the said tax of 1870 had previously been paid by said John Dunbar, and because of the wrongful act of the treasurer in collecting

them again of plaintiff, plaintiff lost the said sum of \$617.11; that had said land been rightfully sold for said taxes, and had it not been for the facts above stated, plaintiff would have been entitled, on the 7th day of May, 1881, to \$1,296 more money than he actually received; that he still owns and holds said certificates and tax receipts, and that by reason of the facts aforesaid, the defendant has become indebted to the plaintiff in the said sum of \$1,296.24, which he demands with interest as therein specified. The defendant demurred generally to both causes of action, which demurrer was sustained by the court. The plaintiff standing by his petition, the court rendered final judgment against him; and he brings the cause to this court on error.

The section of the statute under which this action was brought is as follows:

"Sec. 71. When by mistake or wrongful act of the treasurer or other officer, land has been sold contrary to the provisions of this act, the county is to save the purchaser harmless by paying him the amount of principal and interest to which he would have been entitled had the land been rightfully sold; and the treasurer or other officer and their sureties shall be liable for the amount on their bonds to the county, or the purchaser may recover the amount directly from the treasurer or other officer making such mistake or error." Gen. Stat., 924.

Parties dealing with a county, or other municipal corporation, are under a peculiar obligation to act with fairness and in good faith, as such corporation can only act through its records and other instrumentalities given it by law. Such persons are bound to take notice of such records, not only of what they show, but also, if such be the case, of their failure to show, matters material to the business in hand. It was then the duty of the plaintiff, before buying the lands in question at private tax sale, to examine the record and see for what taxes they were being

sold. If he neglected this duty, or knowingly co-operated with the county treasurer in a sale and purchase of the land for a tax unauthorized by law, he cannot call upon the county to save him harmless from the effect of such imprudence. So, also, in regard to the notice of sale, had the plaintiff been buying at public sale it would have been his duty, as the law then stood, to have seen to it that the notice of the time and place of such sale had been properly published, and the proof of such publication filed in the county clerk's office; and, as he was buying at private sale, the power to make which depended upon that of its having been previously offered at public sale in the manner provided by law, and not sold for the want of bidders, it was his duty to see that the record not only contained proof of publication of a proper notice of public sale, but also that the land had been offered at such public sale and not sold for want of bidders. But if the purchaser, the most active and interested participant in the purchase and sale, chose to neglect these duties, the county, which was scarcely present at all, cannot be held to insure him from the loss which always does and probably is generally intended to follow an investment made with such apparent imprudence.

In regard to the failure of the assessor to take, subscribe and attach to the assessment roll the oath prescribed by section 12 of the old revenue law, it is only necessary to say that if such failure can be held to be such a "mistake or wrongful act of the treasurer or other officer" as would deprive the purchaser at tax sale of any right "to which he would have been entitled had the land been rightfully sold," then, as the presence or absence of such oath is a matter of record, the purchaser must act upon it at his peril. As to any objection that might exist to the manner of making said sale—that the lands were not offered to the person who would pay the taxes for the smallest portion of each subdivision, or that the lands were not sold for all the taxes then due on them—such objection

can not be urged by a party to such sale. As to the taxes of 1870 paid by the said purchaser, and which it turns out had been previously paid by the said John Dunbar, it is only necessary to refer to the opinion of this court in the case of *Otoe Co. v. Gray*, 10 Neb., 565. Judge LAKE, in the opinion, says: "According to the petition, the claim of the purchaser does not rest upon the fact of the sale having been defeated by reason of some irregularity, or omission by some officer of the revenue of any formality essential to its validity, but substantially on the fact that, for want of jurisdiction in the treasurer over the land, the pretended sale was absolutely void. As to the jurisdiction of the treasurer in this matter, there can be no doubt, we think, that it ceased immediately upon the payment of the tax, and that thenceforward, in all that he did, he was a mere wrongdoer to whom the statute was no protection, and for whose acts the county is in no wise answerable under the section above quoted."

But there is one remaining "mistake or wrongful act of the treasurer," by which it is alleged that the said lands were "sold contrary to the provisions of the revenue law:" that is, that the owners, to whom they were severally assessed, were in the occupancy thereof at and before the time of such sale, and had thereon sufficient personal property out of which said taxes could have been made by the said treasurer by the seizure and sale thereof, but that the said lands were sold for said taxes without any attempt to make the same out of such personal property. This court has repeatedly held that a sale of land for taxes under circumstances such as these was void, and, as the law underwent an important amendment in 1877, it is improbable that the principle of such decisions will be reconsidered, whatever might now be the views of the court as to its correctness as an original proposition. Unlike those which we have been considering, the "wrongful act of the treasurer" in selling the land for taxes without first making an

effort to collect them by the seizure and sale of personal property, as well as the existence of such personal property out of which the same could have been collected, was not matter of record, of which the purchaser was bound to take notice, or of which he could be said to be estopped to assert, by participating in the purchase and sale. I know of no reason, nor has any been suggested, why on this point the plaintiff's allegations in both causes of action are not within the terms of the statute binding the county to hold him harmless, etc.

It is assumed in the brief of plaintiff in error that the demurrer was sustained on the ground that the claim of the plaintiff was barred by the statute of limitations, and that to reach that conclusion the court held that the plaintiff's cause of action accrued immediately upon his purchase of the land. If that was the ground of the decision, it cannot be sustained. In the case of *Peet v. O'Brien*, 5 Neb., 360, this court held that, "the title acquired by a purchaser at a tax sale might be said to fail when it should be pronounced invalid by the judgment or decree of a court of competent jurisdiction over the subject matter." Until plaintiff's title failed he had no right to call on Otoe county to hold him harmless, etc., and it was then that the statute commenced to run.

The judgment of the district court is reversed, the demurrer overruled, and the cause remanded to the district court for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

JOHN B. LONG AND J. E. SMITH, PLAINTIFFS IN ERROR,
v. D. C. CLAPP ET AL., DEFENDANTS IN ERROR.

1. **Damages: GENERAL RULE.** In addition to the general measure of damages, the law in some cases imposes upon a party injured from another's breach of contract or tort the active duty of making reasonable exertions to render the injury as light as possible. Where this duty exists, the labor or expense which its performance involves is chargeable to the party liable for the injury thus mitigated.
2. **The instructions given by the court to the jury, as set out at length in the opinion, Upheld.**
3. **Action against two Defendants: VERDICT: NEW TRIAL.** Under the provisions of sec. 429 of the code, in an action against two defendants charging them with the making and the breach of a joint warranty in the sale of chattels, the evidence being ample as to one but insufficient as to the other defendant, the verdict and judgment should be against the one and for the other. And in such a case, where the verdict was against both defendants, and the one against whom there was but insufficient evidence made no motion for a new trial as to himself alone, and judgment was rendered against both, it will not be disturbed.

ERROR to the district court for Gage county. Tried below before WEAVER, J.

A. H. Babcock and Brown & Ryan Brothers, for plaintiffs in error.

Proof shows simply that Smith was a joint owner. This would not justify a verdict on the warranty of Long. *Mayberry v. Willoughby*, 5 Neb., 375. *Boeklen v. Hardenburgh*, 37 N. Y. Sup. Ct., 110. *Woodward v. Cowing*, 41 Me., 9. *Iliff v. Brazill*, 27 Iowa, 131. *Parsons on Partnership*, 95. *Norton v. Thatcher*, 8 Neb., 191. *Huckabee v. Nelson*, 54 Ala., 14. *Powers v. Irish*, 23 Mich., 429. *Richards v. Walton*, 12 Johns., 434. *Dickson v. Burke*, 28 Tex., 117. *Fuller v. Robb*, 26 Ill., 246. *Dickerson v. Chrisman*, 28 Mo., 134.

15	417
16	33
17	666
19	545
19	745
22	424
15	417
33	92
15	417
31	149
39	305
15	417
138	281
15	417
41	98
41	251
41	522
15	417
43	594
15	417
48	147
15	417
53	481
55	17
15	417
56	641

Colby & Hazlett and L. M. Pemberton, for defendants in error.

Damages recoverable. Field, §§ 273, 288, 274, 906. Sutherland, 435. Long testifies that he and Smith were *jointly interested*. What that joint interest was does not appear, but jury were justified in finding it sufficient to make them partners. *Nebraska Railway v. Lett*, 8 Neb., 251. 1 Lindley on Partnership, 236. *Chapman v. Murch*, 19 Johns., 290. *Osgood v. Lewis*, 2 Har. & Gill., 495. Long was authorized by Smith to sell his interest in the sheep, and an authority to sell such property carries with it an authority to warrant. *Schuchardt v. Allens*, 1 Wallace (U. S.), 359. *Andrews v. Kneeland*, 6 Cowen, 354. *Taylor v. Green*, 8 C. & P., 316. 2 Addison on Cont., § 631 (Morgan's Ed.), and cases cited in note 1.

COBB, CH. J.

This action was brought in the court below by the defendants in error against the plaintiffs in error for damages occasioned by a breach of warranty in the sale by plaintiffs in error to defendants in error of five hundred head of sheep, which were warranted to be sound and free from scab, etc., but which were diseased and affected with the scab. The said plaintiffs in the court below also alleged and set up in their petition that they then had on their farm another band of sheep, consisting of 500 head, which were sound and free from disease; that when they bought the said first mentioned sheep it was with the intention and purpose of placing and keeping them together with said band which they already had on hand, all of which they allege was known to the defendants below at the time of said sale and warranty; that they took the said sheep so warranted to their farm and turned them in with their other band above mentioned; that in consequence thereof the said disease affected and spread among the sound sheep of said

original band "until the whole flock become diseased, and three hundred and eighteen valuable ewes and seven valuable bucks thereof died of the said disease, and the remainder of said flock become covered with scab and lost large quantities of wool of great value, and become sick and dropped and lost their lambs of great value and required extra care and nursing and doctoring; that they had to and did hire extra help—several men for during about nine months * * * and did necessarily expend large sums of money for medicines and extra sheds and pens and doctoring and caring for said diseased sheep, to-wit, the sum of \$500; and that by reason of the premises plaintiffs have been damaged in the sum of \$6,000," etc.

The defendants answered severally: Long admitting the sale of the sheep to the plaintiffs, but denying every other allegation contained in the petition; and Smith denying everything.

There was a trial to a jury, verdict against both defendants, and judgment for \$1,500 against both defendants, who bring the cause to this court on error.

The first point made by plaintiffs in error in their brief is founded upon the alleged error of the court in permitting certain questions to be propounded to and answered by witnesses on the part of the plaintiffs below as to the expense incurred by the plaintiffs below "in curing these sheep, medicines, ointment, and doctoring them for the purpose of curing the disease," and to which the witnesses answered: "Tobacco cost \$150; don't know price of medicines and ointment." Also the following question: "What was the expense of extra help in caring for these sheep when diseased?" A. "The extra care is according to the winter; and from the time the sheep broke out we were with them all the time, and had five men through lambing, five with ourselves, that is, three others * * * it must have cost us three hundred dollars for extra help."

So far as the warranted and diseased sheep were con-

cerned, if their value in their diseased condition had been definitely fixed, and no longer a question to be affected by the evidence, then this testimony might have been unnecessary, and hence its admission erroneous. But as I understand the testimony the value of sheep in the diseased condition in which these were proved to be, was, at the time this testimony was given, an open question. The value of a diseased band of sheep, if the disease is curable, depends among other things upon the cost of the medicines and extra labor and attention in taking care of them, necessary to effect a cure.

No doubt the law of damages is correctly stated by counsel for plaintiff in error in their brief, that "the measure of damage on sale of diseased sheep is the difference in value at the time of the breach and the value if the warranty had been true. But in many cases the law adds to this the reasonable costs of the measures which the injured party is bound to take to lessen the damages."

The rule is thus stated in *Sutherland on Damages*, vol. 1, p. 148: "The law imposes upon a party injured from another's breach of contract or tort the active duty of making reasonable exertions to render the injury as light as possible. If, by his negligence or willfulness, he allows the damages to be unnecessarily enhanced, the increased loss, that which was avoidable by the performance of his duty, falls upon him. This is a practical duty under a great variety of circumstances, and as the damages which are suffered by a failure to perform it are not recoverable, it is a duty of great importance. Where it exists, the labor or expense which its performance involves is chargeable to the party liable for the injury thus mitigated; in other words, the reasonable cost of the measures which the injured party is bound to take to lessen the damages, whether adopted or not, will measure the compensation the party injured can recover for the injury, or the part of the injury, that such measures have or would have prevented." See also cases there cited.

But it was not the warranted sheep only that were involved in the expenditure under consideration. These had been turned in with plaintiffs' original band of sound sheep, which had also become infected with the disease, and the expense of "medicines, ointment, and doctoring" was indiscriminately devoted to the whole band. It will not be questioned that the expense of medicines and doctoring the original band was properly chargeable to defendants as part of the damages resulting from the breach of warranty of the soundness of the others. On either of these grounds I think the testimony admissible.

The second point is made upon the third instruction given by the court to the jury on the part of the plaintiff. The instruction is as follows:

"3. The jury are further instructed that, if you find from the evidence that the defendants sold the said sheep as alleged in plaintiffs' petition, representing the said sheep to be all right, sound and free from scab and foot rot, when they were not sound and free from disease, but that all or any of them at the time of the sale were affected and had been exposed to an infectious and contagious disease, and that, relying on the defendant's representations as true, and having no knowledge of the actual condition of said sheep, and plaintiffs put the said sheep in question, purchased of defendants, into plaintiffs' own flock with other sheep belonging to and owned by plaintiffs, whereby they also became diseased and infected by scab or the disease from the said sheep mentioned in plaintiffs' petition purchased from the defendants, and any of said sheep died of said disease, and others become impaired and depreciated in value by reason thereof, without any fault or neglect of the plaintiffs, then the defendants are liable for the loss so sustained."

There was testimony in the case that the plaintiffs had turned a number of bucks into the band after the sheep had, some of them, shown signs of the disease, and some of

said bucks died of the disease. As to these bucks, the court, at the request of defendants, instructed the jury as follows:

"8. It appears from the plaintiffs' own testimony that the plaintiffs knew at the time they turned the bucks in with the ewes that the ewes were infected with the scab, the plaintiff cannot, as to such bucks, recover any damage for any injury they may have sustained by reason of such disease."

The defendants complain of instruction No. 3 of plaintiffs', given above, because, as they say, it recognizes no distinction between the right of recovery as to the five hundred sheep previously owned and the bucks. Taking the two instructions together, I think that such distinction is fully recognized. In the first named instruction, as to damages to "other sheep," the plaintiffs' right to recovering is limited to the case where, "relying on the defendants' representations as true, and having no knowledge of the actual condition of said sheep, they put the said sheep in question, purchased of defendants, into plaintiffs' own flock and with other sheep," etc. Now this instruction very clearly, to my mind, excludes from the consideration of the jury those bucks which were knowingly turned into the band after the plaintiffs were no longer without "knowledge of the actual condition of said sheep," and after they had ceased to rely upon the defendants' representations in that behalf as true; and as to them, the court tells the jury in the eighth instruction of defendants that the plaintiffs cannot recover. I cannot well conceive how the law could have been more correctly stated, nor do I think it possible that the jury could have failed to understand the instructions.

The third and final point made by plaintiffs in error is, that there was not sufficient evidence to sustain a verdict and judgment against the defendant Smith, etc.

As to this point, whatever might be the views of the court as to the weight of the evidence connecting the de-

fendant Smith with the sale and warranty of the sheep, I do not think that the judgment can be disturbed on that account. It has often been said in this court that an objection to a judgment or other proceeding of a district court will not be heard primarily here. The only right possessed by this court in the case at bar rests upon its appellate jurisdiction. And it has as often been said that, before this court will reverse any judgment or order of a district court it must be made to appear that the matter has been brought before and to the attention of that court, and a ruling had thereon. It is that ruling which this court will in a proper case reverse.

There was a motion for a new trial in this case, and one of the grounds therein stated is, that "the verdict is not sustained by sufficient evidence;" also, that "the verdict is contrary to law;" but this point is not made, that the evidence fails specially in its application to defendant Smith. Under the common law practice, where the declaration counted upon a joint liability on the part of several defendants, and the evidence only proved a several liability as to one of them, the plaintiff was nonsuited. But not so under the code. Section 429 provides that: "Judgments may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; it may determine the rights of the parties on either side, as between themselves, and it may grant to the defendant any affirmative relief to which he may be entitled. In an action against several defendants, the court may in its discretion render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper. The court may also dismiss the petition with costs, in favor of one or more defendants in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served." This is an exact copy of section 371 of the Ohio code, under

which it has been held that, "Judgment may be rendered for or against one or more of several defendants where it turns out upon the trial that only one or more of several defendants in such joint action is liable," etc. Such being the law, the motion for a new trial as made was properly overruled. It has not escaped notice that the motion for a new trial commences as follows: "And now on this day come said defendants and separately move the court for a new trial," etc. But the use of these words does not alter the fact nor make that two motions which was but one. See *Dunn v. Gibson*, 9 Neb., 513.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

FRANCIS S. WHITE, PLAINTIFF IN ERROR, v. CHARLES
M. LEIGHTON ET AL., DEFENDANTS IN ERROR.

The instructions by the court to the jury, set out at length in the opinion, *Upheld*.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Charles E. Magoon, for plaintiff in error, cited: *Story's Agency*, 111. *Reitz v. Martin*, 12 Ind., 307. *Meyer v. Baldwin*, 52 Miss., 263. *Carter v. Burnham*, 31 Ark., 213. *Smith's Mercantile Law*, 171. *White v. Cooper*, 3 Penn. St., 135. *Wheeler v. Plattsmouth*, 7 Neb., 279. *McDonell v. Dodge*, 10 Wis., 92.

Harwood & Ames, for defendants in error, cited: *Starring v. Mason*, 4 Neb., 367. *Furnas v. Frankman*, 6 Neb.,

429. *Fatman v. Leet*, 41 Ind., 133. *Kerslake v. Schoonmaker*, 1 Hun., 436. *Prescott v. Jones*, 13 Neb., 534.

COBB, CH. J.

The only question involved in this case which it is deemed necessary to notice is that raised by the exception to instructions given by the court to the jury upon the trial of the cause. The suit was brought by Leighton & Brown against Francis S. White, for a balance due on an account which had been running from June 20, 1878, to July 23, 1880. This account consists of merchandise alleged to have been sold by the plaintiffs, who were wholesale druggists at Lincoln, to the defendant, who carried on a retail drug store at South Bend, in Cass county, at thirty different and respective dates within the time above stated, and twenty-five different payments of cash; the debit side of the account amounting to six hundred twenty-eight dollars and sixty-seven cents, and the credit side to four hundred thirty-five dollars and forty cents. There is no dispute as to the correctness of any item of the account; but the controversy arises out of the fact that the drug store at South Bend was carried on by the defendant through the agency of one Lazenby, and not personally by the defendant, who resided at Plattsmouth between twenty and thirty miles away. This agency was evidenced by a written article of agreement between White and Lazenby, one clause of which was in the following words: "It is further agreed that A. Lazenby is not to give orders for goods, medicines, or wares without the consent of F. S. White." No knowledge of this agreement or that there was an agreement in writing between White and Lazenby was brought home to the plaintiffs. The goods were mostly sold on written orders sent from South Bend by Lazenby in the name of White; some of the orders were received at the store in South Bend by the traveling men of the plaintiffs visiting that place.

Defendant contends that these purchases were made without his consent and in violation of the article of agreement between him and Lazenby.

The above statement of the case, as shown by the pleadings and evidence, is believed to be sufficient to show the application of the instructions excepted to, which I copy:

"1. If you find from the evidence that the defendant White put one Lazenby into possession of the store at South Bend, with authority to carry the same on in the name of the defendant, and from the nature of the business and the manner in which it was carried on, the said Lazenby was held out to the world as having authority to do all business necessary to carry on said store, including the buying as well as the selling of goods, and if you further find from the evidence that the plaintiffs sold the goods in question believing said Lazenby had authority to buy said goods, the defendant is liable therefor, notwithstanding by the terms of the written agreement between the defendant and Lazenby, Lazenby had no authority to buy goods or make orders therefor without the consent from defendant; and the fact that said Lazenby is indebted to the defendant is immaterial."

"2. By the terms of the written agreement between the defendant and Lazenby, Lazenby had no authority to buy goods or make orders therefor without the consent of the defendant; and the defendant is not liable for goods purchased by said Lazenby without the consent of the defendant; and you will find for the defendant, unless you further find from the evidence that said Lazenby was held out to the world as having authority to do all business pertaining to the carrying on of said store, including buying as well as selling goods."

I do not think these instructions open to the objections made by counsel. There is no evidence of any representation made by Lazenby or anyone, so that the only evidence

before the jury to which the instructions could apply was that showing the putting of Lazenby in charge of the drug store of White, the giving him the sole charge of it, while White resided at Plattsmouth, and only visited South Bend and the store about once a month, etc.

There has been a great change in the methods of conducting business since the days when the common law was in the plastic state, and even since the time of Kent and Story. Formerly, all stock for the supply of retail stores was bought at the few great commercial centers, and such purchases were the object of an annual or semi-annual "going on" by the retail merchant, who, at the wholesale stores and factories, "laid in" a year's or a half year's supply. Then, to place a man in charge of a retail store, even if the owner did not visit it oftener than once in six months, was to hold him out to the world as having authority to sell only, and that only at retail. Why? Because that was the usual course of business in those days. But the railroad train and the commercial traveler have changed all this. Now, the annual or semi-annual pilgrimage to the great commercial centers is seldom or never made by retail dealers of places of the size of South Bend, for the purpose of laying in the fall or the spring stock; but it is the usual course of business to replenish the waning stock by frequent purchases by sample through the often-calling and ever-affable commercial traveler, without the necessity of leaving the retail counter. Therefore I think that in view of the general course of business of to-day, to establish a retail store in a place from twenty to thirty miles away from the owner's residence, place a clerk or agent in the sole charge of it, the owner only visiting such store or the town where it is situated once a month, and sometimes only once in two or three months, is to hold out such clerk or agent as not only authorized to sell goods at retail but also to keep the stock replenished by purchases according to the usual course of business. At all events, I think that this case was fairly

submitted to the jury by the instructions under consideration, and that the verdict was right.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

ALFRED OSBORNE ET AL., PLAINTIFFS IN ERROR, V. W.
A. McALLISTER, DEFENDANT IN ERROR.

"**Threshing Machine**" defined. The words "threshing machine," as generally used and understood in this state, include in their meaning the horse-power by means of which the separator is propelled.

ERROR to the district court for Platte county. Tried below before POST, J.

Cornelius & Sullivan, for plaintiffs in error, cited: *Hays v. Wilcox*, 17 N. W. R., 110.

S. S. McAllister, for defendant in error, cited: *Smith v. McLean*, 24 Iowa, 322. *Winter v. Landphere*, 42 Id., 471. *Golden v. Cockril*, 1 Kan., 259. *Brown v. Holmes*, 13 Id., 482. *Jones Chattel Mortgages*, §§ 53-61. *Herman*, §§ 38-40. *Jordan v. Hamilton County Bank*, 11 Neb., 503.

COBB, CH. J.

It appears from the record in this case that on the twenty-first day of December, 1880, one Phillip Wullschleger was the owner of the chattels hereinafter mentioned, in Merrick county, where he resided; and on that day for the consideration of \$100, as therein expressed, executed and delivered to the defendant in error a certain chattel mortgage,

wherein the said property was described in the following words: "One Pitt's Chicago threshing machine number two;" which chattel mortgage was duly filed in the clerk's office on the fifth day of January, 1881; that thereafter, on the twenty-fourth day of March, 1881, the said Wullschleger, still being in possession of the said personal property, and being indebted to one William Harris for work and labor in the sum of \$47, gave his promissory note therefor and verbally agreed to give him a lien as security therefor upon the Chicago Pitt's threshing machine power; and that on the sixth day of December, 1881, the said Harris assigned said note given by Wullschleger to him as aforesaid together with said verbal lien on the said horse-power to the plaintiffs in error.

The debt of the said Wullschleger to the defendant in error secured by the said chattel mortgage not having been paid, and the said horse-power having come into the possession of the plaintiffs in error, this action was commenced in the court below by the defendant in error against the plaintiffs in error for the value of said property.

Upon the trial the court, among others, gave the following instructions:

"1. The mortgage under which plaintiff seeks to recover does not in terms include the said horse-power, but such fact is not sufficient of itself to defeat plaintiff's right of recovery."

"2. If you should find that at the time said mortgage was executed it was the understanding and agreement between plaintiff and said Wullschleger that said mortgage should include said "horse power," and in fact that said power was included in said mortgage under the description of "one Chicago Pitt's threshing machine," and if said mortgage was executed in good faith with no intent on the part of the plaintiff to defraud the creditors of said Wullschleger, the plaintiff should recover unless it appears that at the time defendants acquired their lien upon said horse-

power they had neither knowledge nor information sufficient to put them upon inquiry as to plaintiff's rights."

"3. But if you find that, at the time defendants acquired a lien upon said horse-power from the witness Harris, neither the said witness nor defendant had any knowledge of plaintiff's mortgage or information sufficient to put them as reasonably prudent and intelligent men upon inquiry as to the rights of plaintiff, in such case plaintiff's mortgage would be no protection, and your verdict should be for the defendants, but upon this point the burden of proof is upon the defendants, who must show such facts by a preponderance of evidence."

"4. If, at the time Wullschleger conveyed said "horse-power" to one McCrea and said McCrea sold the same to defendants, said defendants had knowledge that the plaintiff claimed said horse-power under his mortgage, defendants can claim nothing through said purchase from McCrea as against the plaintiff's rights under said mortgage."

"5. You are instructed that the law requires every chattel mortgage to be filed in the office of the county clerk where the mortgagor resides, and indexed in a book provided for that purpose, and when so filed and indexed in accordance with law such filing and indexing would be notice to the world of the contents of such mortgage, and it would not be necessary, in order to protect the mortgagee against the claims of subsequent purchasers or creditors of the mortgagor, to file said mortgage in any other county to which the mortgaged property might be removed."

"6. If you find from the evidence that the property in dispute in this action was a part of the threshing machine mortgaged by Wullschleger to the plaintiff McAllister, then you will find for plaintiff."

"7. If you find from the evidence that the property in controversy in this case was intended to be included in the mortgage under which plaintiff McAllister claims title, by the mortgagor Wullschleger and McAllister, the plaintiff,

and the mortgage so refers to the property in controversy as to put a reasonable, prudent, and diligent man upon inquiry and investigation, then you should find for the plaintiff.”

The giving of which instructions are assigned for error by the plaintiffs in error.

The jury brought in a verdict in favor of the defendant in error for the sum of \$25. There was a motion for a new trial, which was overruled and judgment entered on the verdict. Defendants bring the cause to this court on error.

In addition to the instructions as above stated, plaintiffs in error assigned for error the admission in evidence by the court of the copy of the chattel mortgage from Wullschleger to McAllister above referred to. The principal question involved in the case is, whether the words “One Pitt’s Chicago threshing machine number 2” include in their meaning the horse-power by which the separator is propelled or not? We cannot entirely approve of the law as laid down by the court in its charge to the jury. In the charge throughout, the court seemed to lay great stress upon what might have been the understanding between the defendant in error and Wullschleger, and he must have meant an understanding fuller than that expressed in the chattel mortgage itself. The chattel mortgage was constructive notice only of what it expressed and not of any understanding between the parties thereto not expressed by its words. I think it was the duty of the court to have told the jury whether the horse-power was included in the words of the chattel mortgage or not; and not have left it to them to find as they might construe the meaning thereof. It was a question of law for the court and not a question for the jury. But I think this was error without prejudice, because I think that the horse-power is included in the general words “threshing machine” as used and understood generally in this state; and that therefore the filing of the

chattel mortgage was notice to the plaintiffs in error of the lien upon said property, including the horse-power, in favor of McAllister, the defendant in error. It is not necessary to further comment upon the other errors assigned, as the only ground of alleged error in the admission of a copy of the chattel mortgage in evidence is, that it did not contain a description of the property in controversy.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

The other judges concur.

15	432
21	671
15	432
44	763
15	432
49	631

CALVIN M. SMITH, APPELLEE, V. LEVI DEAN,
APPELLANT.

1. **Finding against Evidence.** Where the evidence on behalf of the plaintiff and defendant is about of equal weight this court will not disturb the finding as being against the weight of evidence.
2. **Husband and Wife.** A deed from a husband directly to his wife may be sustained if equitable grounds, such as a valuable consideration, exist for sustaining it.
3. **Parties: ACTION QUIA TIMET.** A party having the legal title to unimproved lands not in the actual possession of the defendant may maintain an action to quiet his title to the same.
4. **Deed: DESCRIPTION, Held, Sufficient.**

APPEAL from the district court of York county. Tried below before GEORGE W. POST, J.

Edward Bates, for appellant, on conveyance from husband to wife, cited: *Aultman v. Obermeyer*, 6 Neb., 260. *Winans v. Peebles*, 32 N. Y., 423. Action *quia timet* not

proper. *State v. S. C. & P. R. R.*, 7 Neb., 376. Description insufficient. 3 Wash. Real Prop., 381. *Wofford v. McKinna*, 23 Tex., 44. Defendant's title is good against plaintiff's unrecorded deed. 3 Wash. Real Prop., 339. *Bell v. Twilight*, 18 N. H., 159. *Trull v. Bigelow*, 16 Mass., 406.

Sedgwick & Power, for appellee, cited: 3 Wash. Real Prop., 407, 408. *McDonald v. Early*, ante p. 63. *Crook v. Vandervoort*, 13 Neb., 507. *Hanlon v. Wilson*, 10 Neb., 138.

MAXWELL, J.

This is an action to quiet title. A decree was rendered in the court below in favor of the plaintiff, from which the defendant appeals to this court. It appears from the record that in May, 1872, one Jacob R. Gilmore obtained a patent from the United States for the north-east quarter of section seven, in township nine north, range one west, in York county; that a few days prior to that time, but after he was the owner of the land, he conveyed said land directly to his wife by a warranty deed; that in December, 1873, Catharine E. Gilmore, the wife of Jacob R. Gilmore, by warranty deed conveyed "all that certain piece of land lying in the bend of the West Blue river, described and bounded as follows: Commencing at a point in the center of the West Blue river about five rods west of the point where the center line of said river crosses the east line of sec. No. seven, of township No. nine north, of range No. one west, thence nearly due west along the top or brow of the bluff on the south side of said river, and past a stake on said bluff until this line strikes the center of said West Blue river at a point about thirty rods west from the place of beginning, thence along the center of said Blue river towards the east to the point of beginning, containing four and three-quarters acres more or less." The consideration

paid by the plaintiff for the land was the sum of \$95. In March, 1874, Gilmore and wife executed a mortgage to the Union Mutual Life Insurance Co. upon the entire quarter section. In January, 1880, Gilmore and wife made a quitclaim deed to one Harding, in full satisfaction of the mortgage, with the right to redeem at any time within one year. In November, 1880, Gilmore and wife sold the redemption contract to the defendant, who obtained a deed from the insurance company. All of these deeds and mortgages were recorded soon after their execution, except that to the plaintiff, which was not recorded until September, 1881. The deed from Gilmore and wife to the insurance company and from the insurance company to the defendant purported to convey the entire quarter section. The defendant claims to be an innocent purchaser without notice of the plaintiff's rights. The tract conveyed by Gilmore and wife to the plaintiff was at the time of the purchase and now is covered with timber, and there was no actual possession except from occasionally cutting timber from the same. The plaintiff, however, claims that the defendant had actual notice of his rights before purchasing, and that he took the title subject to such rights. Upon this point the proof is conflicting. Elias and Jacob R. Gilmore both swear positively that before the defendant purchased the land he was informed by them that the plaintiff owned the land in dispute. There is also other evidence tending to establish the same facts. The defendant testifies positively that he had no notice, actual or constructive, and also introduced witnesses who contradicted the plaintiff's witnesses on some material points. The evidence is so nearly balanced that the court might have found for either party without danger of the finding being reversed as being against the weight of evidence. The finding being for the plaintiff therefore will not be set aside.

Objection is made that the conveyance being direct from Gilmore to his wife that no title passed by such deed, and

that therefore no title passed to the plaintiff by the deed of Mrs. Gilmore to him. At common law no title passed by a deed from a husband to his wife, for the reason that the right of the wife to make contracts was suspended during coverture. The doctrine evidently originated at a time when a wife was regarded as but little better than a slave, and has but little application to our state of society, and will not be extended beyond the strict requirements of the law. In equity a wife has ever been regarded as a distinct person, capable of contracting, and whenever equitable grounds for relief have existed her rights have been enforced and protected. So the deed of a husband to his wife, though void at common law, will be sustained whenever equitable grounds exist for sustaining the same, such as a valid consideration. *First National Bank v. Bartlett*, 8 Neb., 328. *VanDeuzer v. Peacock*, 11 Id., 245. *Crook v. Vandevoort*, 13 Id., 507. *Putnam v. Bicknell*, 18 Wis., 351. *Hannan v. Oxley*, 23 Id., 519. *Beard v. Dedolph*, 29 Id., 136. *Fenelon v. Hogoboom*, 31 Id., 172. *Carpenter v. Tatso*, 36 Wis., 297. *Mehlhop v. Pettibone*, 11 N. W. R., 553. The testimony clearly shows that the contract for the land was made by the plaintiff with both Gilmore and wife, and the sum of \$95 was paid for the land. The deed, therefore, from Mrs. Gilmore to the plaintiff is valid.

Objection is made that the form of the action should be ejectment, and not to quiet title, but as the plaintiff has the prior deed, and thereby constructive possession of the land in dispute, and as the defendant is not in actual possession of the same, the plaintiff may maintain an action to quiet title. The description of the premises would not be definite but for the fact that the land conveyed is in a bend of the river, and the line running westwardly from one point on the river to another passes along the brow of the bluff. This point fixes the limit from the bend in the river, and the testimony tends to show that the line can thereby be

Dohle v. Omaha Foundry.

rendered certain. There is no error in the record and the judgment will be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

15	436
37	778
15	436
43	514
15	436
52	394

HENRY DOHLE, PLAINTIFF IN ERROR, V. THE OMAHA
FOUNDRY AND MACHINE COMPANY, DEFENDANT IN
ERROR.

An action to foreclose a mechanic's lien is essentially a suit in equity, and a party is not as a matter of right entitled to a jury trial therein.

ERROR to the district court for Douglas county. Tried below before WAKELEY. J.

George W. Doane, for plaintiff in error.

T. W. T. Richards and *H. D. Estabrook*, for defendant in error.

MAXWELL, J.

This action was brought by the Omaha Foundry and Machine Co. against Henry Dohle to foreclose a mechanic's lien. Dohle filed an answer to the petition wherein he denied the facts stated therein, except as otherwise admitted; and second, set up a counter-claim for losses sustained by him by reason of the delay in furnishing the material. On the trial of the cause Dohle demanded a jury, which the court refused. He then withdrew his counter-claim, and the court rendered judgment against him for the sum \$902.16, and ordered the premises to which the lien attached to be sold. He appeals to this court.

The first error assigned is the refusal of the court to call a jury to try the issues in the case. As the counter-claim was withdrawn after the jury was demanded, and no demand for a jury to try the remaining issues, we might consider the objection waived. We will however determine the question.

In a purely legal action a party may demand a jury as a matter of right. *Lamaster v. Scofield*, 5 Neb., 148. *Mills v. Miller*, 3 Id., 94.

Sec. 280 of the code provides that issues of fact arising in actions for the recovery of money or of specific real or personal property shall be tried by a jury, unless a jury trial is waived. But an action to foreclose a mechanic's lien is essentially equitable in its nature. It is a proceeding to subject the property on which the lien exists to the satisfaction of the debt. No general execution issues in the case but an order to sell the premises described in the petition. It is an action in equity. The question here involved was before the supreme court of Minnesota in *Sumner v. Jones*, 7 N. W. R., 265, and it was held that in an action to foreclose a mechanic's lien the plaintiffs were not as a matter of right entitled to a jury trial. No cases have been cited to the contrary. The court did not err, therefore, in refusing a jury trial.

The second objection is for allowing interest from March 1st, 1881; but inasmuch as the testimony is not preserved in the record we are unable to determine whether the court erred in allowing the same or not. There is no error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

15 438
25 617

DANIEL DESMOND, PLAINTIFF IN ERROR, v. THE STATE OF NEBRASKA, EX REL. AUGUST POFALL, DEFENDANT IN ERROR.

Exemption: WAIVER. Where exempt property has been levied upon, the giving of a redelivery undertaking by the debtor is not a waiver of the exemption.

ERROR to the district court for Madison county. Tried below before BARNES, J.

George N. Beels, for plaintiff in error.

No appearance for defendant in error.

MAXWELL, J.

The defendant in error made application to Judge Barnes for and obtained a peremptory writ of mandamus. In the application he alleges that he is the head of a family, a resident of the state, and actually engaged in the business of agriculture; that on the twenty-fifth day of January, 1882, one Cyprian Inman caused an execution to be issued on a judgment rendered before a justice of the peace in his favor and against said Pofall; that the execution was delivered to Desmond as deputy sheriff, and he levied the same on one span of horses, a set of harness, and one wagon, the property of said Pofall; that on the eleventh of March, and before the sale of said property, said Pofall claimed the same as exempt from execution by filing with said officer a sworn inventory of all his property; that said Desmond refused and still refuses to release said property, but has advertised the same for sale under said execution, etc.; that said execution was not issued on a claim for clerk's, laborer's, or mechanic's wages, nor for money due and owing by an attorney at law.

The answer alleges that Pofall has made no selection of the property *as required by law*; that the plaintiff has submitted to the levy without protest or reservation by giving Desmond a redelivery bond, etc.

On the hearing Judge Barnes found that the property levied upon was exempt, and granted a peremptory writ of mandamus, and taxed the costs to Desmond. He brings the cause into this court by petition in error. It is clearly shown that the property levied upon was exempt. This being so, does the giving of a redelivery bond to the officer waive the exemption? We think not.

Sec. 1072 of the code authorizes the officer to take "security for his own indemnity" when he permits the execution debtor to retain the property to the time of sale. But if the property was exempt the giving of such security would not be a waiver of the exemption. It is not the policy of the law to deprive the head of a family of the means of gaining a livelihood, and reduce him from a useful citizen to a pauper. The exemption law is to receive a liberal construction in order to carry its beneficent provisions into effect. If property is exempt no good reason exists why the debtor should not be permitted to claim it at any time before the sale, and such has been the practice in this state. *Chesney v. Francisco*, 12 Neb., 626. When the levy is made and the redelivery bond given the debtor may not be aware of his rights in the premises, and he simply agrees that the property shall not be removed; in other words, shall be held for the officer subject to the debtor's rights under the law. The officer acquires no greater rights by the undertaking than he would have had by taking the property into his possession. He should therefore have released the property without compulsion, and having failed to do so the judgment must be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JONAS M. CLARINE, PLAINTIFF IN ERROR, V. ANDREW
A. NELSON, DEFENDANT IN ERROR.

1. **Bill of Particulars of Set-off.** In an action before a justice of the peace, it is only in cases where the plaintiff, his agent, or attorney requires the defendant to file a bill of particulars of his set-off that it is necessary to do so.
2. ———: **EVIDENCE.** Where the plaintiff in his bill of particulars has set out the entire account—the credits as well as the debits—and the only question is as to the amount due thereon, proof may be received as to such account without the defendant pleading the same items as a set-off.

ERROR to the district court for Furnas county. Tried below before GASLIN, J.

John Dawson, for plaintiff in error.

W. S. Morlan, for defendant in error.

MAXWELL, J.

This action was commenced before a justice of the peace to recover from the defendant the sum of \$33.36, balance claimed to be due the plaintiff on an account, as follows:

“OXFORD, NEB., Aug. 3d, 1882.

“Andrew A. Nelson, [Dr.]

“Dec. 1st, 1881, To cash for ticket.....\$55 00

“May 1st, 1882, “ “ 10 00

“Aug. 2d, 1882, Damages for not fulfilling contract 25 00

“\$90 00

“Aug. 2d, 1882, Credit by eight month's work at

“\$7.08 per month.....\$56 64

“\$33 36”

On the trial of the cause the justice found that the defendant was indebted to the plaintiff on the cause of action set forth in the bill of particulars in the sum of \$63.28, and that the plaintiff was indebted to the defendant for work and labor in the sum of \$78. Judgment was thereupon rendered in favor of the defendant for the sum of \$14.72 and costs of suit. The plaintiff took the case on error to the district court, where the judgment was affirmed.

The errors assigned in this court are: 1st, That the district court erred in affirming the judgment of the justice; 2d, That the court erred in rendering judgment in favor of the defendant because he had pleaded no set-off.

Sec. 951 of the code provides that in all cases before a justice the plaintiff, his agent, or attorney shall file with such justice a bill of the particulars of his demand, and the defendant *if required* by the plaintiff, his agent, or attorney, shall file a like bill of the particulars he may claim as a set-off; and the evidence on the trial shall be confined to the items set forth in said bills.

It is only in cases where the defendant is required by the plaintiff, his agent, or attorney to file a bill of particulars of his set-off that it is necessary for him to do so. If not required to file a bill of particulars he may prove his set-off without pleading it. Where, however, the plaintiff in his bill of particulars sets out the entire account—the credits as well as the debits—and the only question is as to the amount due thereon, proof may be received as to the items of such account without the defendant filing a bill of the same items of credit. It is apparent that the proof was properly received, and there is no error in the record. The judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

15	442
17	567
17	568
24	140
15	442
36	104
15	442
46	623
46	672
46	736

THE STATE OF NEBRASKA, EX REL. WALTER L. WHIT-
TEMORE, V. THOMAS PEACOCK ET AL.

1. **Election:** CANVASSING RETURNS: MANDAMUS. A board of canvassers of the returns of an election possess no authority to throw out the returns of election from certain precincts and refuse to canvass such votes, and if they do so they may be compelled by mandamus to reassemble and complete the canvass.
2. **Mandamus.** If the remedy by action is not adequate, mandamus will lie against public officers for neglect of official duty.

ORIGINAL application for mandamus.

J. R. Webster, for the relator.

Charles O. Whedon, for the respondents.

MAXWELL, J.

This is an application for a mandamus against the defendants, who are special county commissioners of Brown county, to canvass the votes cast in Long Pine precinct for the location of the county seat of that county. It appears from the record that Brown county was organized on the twelfth day of March, 1883, and Thomas Peacock, Isaac N. Alderman, and Daniel D. Carpenter were appointed special county commissioners; that the county was thereupon divided into suitable precincts, and an election called to be held on the nineteenth day of July, 1883, for the election of precinct and county officers and the location of the county seat; that on the twenty-fourth of July, 1883, said commissioners and the county clerk met and canvassed all the returns of said election except Long Pine precinct; that the votes as canvassed for county seat were as follows:

For Ainsworth, 441 votes;
For Long Pine, 309 votes;
For Bassett, 74 votes;

making a total of 824, and as Ainsworth had a majority of all the votes canvassed it was declared the county seat; that the votes cast at Long Pine for county seat were as follows:

For Ainsworth, 2 votes;

For Long Pine, 29 votes;

For Bassett, 45 votes;

For Morris Bridge, 3 votes;

which if canvassed would make a total of 903 votes, and require another election for the location of the county seat.

These returns, upon their face, were sufficiently authenticated to show that they were genuine. The law placed upon these defendants the duty of canvassing the returns—not a portion but all of them. If they could throw out one precinct, why not two or more, and thus practically disfranchise a portion of the people and defeat the will of the majority? Such practice, if sanctioned, would make elections a farce. But such is not the law. The duty of a canvassing board is to count the votes returned by the proper officers, and it has no discretion in the premises, the duties being purely ministerial. *Hagge v. The State*, 10 Neb., 51. *State v. Hill*, Id., 58. *State v. Stearns*, 11 Id., 102. But it is claimed on behalf of the defendants that even if the returns from Long Pine were improperly excluded, still the relator has an adequate remedy by contest, and therefore mandamus will not lie. All the cases seem to agree that a mere right of action will not prevent the issuing of a mandamus in a proper case. The remedy by action must be adequate. Can it be said that the circuitous and expensive remedy by contest is an adequate one—a remedy which may require years to reach the final judgment, while the same result can be reached at once by requiring a canvass of the votes cast? *State v. Stearns*, 11 Neb., 104. A remedy to be adequate should be prompt and efficient, and this is afforded by mandamus. Besides, it does not lie in the mouths of these defendants to plead

another remedy as an excuse for a failure on their part to perform a plain duty. A peremptory writ is awarded as prayed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

THE STATE OF NEBRASKA, EX REL. L. R. CROSBY, v.
W. W. CONES.

1. **School Meetings:** WOMEN MAY VOTE AND HOLD OFFICE.
The act allowing women possessing the qualifications therein prescribed to vote at school meetings is not in conflict with the constitution, and is valid. Women are eligible also to the office of school trustees.
2. ———: WHEN HELD: ADJOURNMENT. The annual school meeting of each school district for the election of officers is required to be held on the first Monday of April of each year, and there is no authority to adjourn the election to another day.
3. **Quo Warranto.** The attorney general is the proper officer to institute proceedings in quo warranto in the supreme court, and not a district attorney.

MOTION to quash information of *quo warranto*.

W. F. Bryant, J. C. Cowin, C. C. McNish, and M. Mo Laughlin, for relator.

J. C. Crawford and John M. Thurston, for respondents.

MAXWELL, J.

This is an original action in *quo warranto* brought by the district attorney of the seventh judicial district on his own behalf, and on the relation of Crosby, to oust the defendant from the office of treasurer of school district No.

30, Cuming county, and install the relator therein. It is alleged in the information, in substance, that on the second day of April, 1883, Crosby was a legal voter in said district, and then had and now has the qualifications required by law to hold the office of treasurer of said district; that at the annual school meeting of said district held at the school house in Wisner on the first Monday in April, 1881 the defendant was duly elected treasurer of the district for the term of three years, and until his successor was elected and qualified, and that he thereupon qualified and entered upon the duties of his office; that on the first Monday of April, 1883, the annual school meeting of said district was held at the school house in the village of Wisner, and after the transaction of a part of the business of said meeting it was by the unanimous vote of said meeting adjourned until the fourth day of May, 1883; that on the fourth day of May, 1883, the qualified voters of said district met at the school house therein, and adopted a resolution to change the board of trustees of said district from three to six, and thereupon proceeded to elect six trustees, viz., two for one year, two for two years, and two for three years, each of whom filed his acceptance; that the defendant Cone was present and participated in the proceedings of the meeting on the first Monday in April, 1883, and the adjourned meeting in May of that year; that on the seventh of May, 1883, said board of trustees duly organized and elected the relator, L. R. Crosby, treasurer of said district; that said Crosby duly filed his bond in the sum of \$5,000 for the faithful performance of his duty as such treasurer, but notwithstanding notice was given to said defendant of these facts, on the nineteenth day of May, 1883, and a demand upon him for the possession of said office, he then refused and still refuses to surrender the same, claiming that he is the lawful treasurer of said district. There is also an allegation that certain women voted at the school meeting, and that a portion of the board elected on the fourth of May,

1883, were women. The attorneys for the defendant now move to quash the writ for a number of reasons which need not be mentioned in detail.

Three questions are presented for determination: 1st, The authority of the district attorney to institute proceedings in this court. 2d, The right of women possessing the qualifications prescribed in the statutes to vote at school meetings and hold the office of trustee. 3d, The authority of the voters at an annual meeting of the school district to adjourn the meeting to a future day, and elect officers at the adjourned meeting.

The authority of a district attorney to institute proceedings of this character in the district courts of the various counties composing his district against persons illegally exercising the duties of an office within such district will not be questioned. Whether his authority extends to the instituting of proceedings in the supreme court is very doubtful, the attorney general being the proper officer. This question, however, was not very fully discussed on the hearing, and as Crosby is joined with the prosecuting attorney as relator, and is entitled to maintain the action, it is unnecessary to further consider the question.

Second. Sec. 4, subdivision 11 of the chapter on schools (Comp. St., 456), provides that every voter and every woman who has resided in the district forty days and is over twenty-one years of age and who owns real property in the district, shall be entitled to vote at any district meeting. Every voter and every woman who has resided in the district forty days and is over twenty-one years of age and owns personal property assessed in his or her name at the last assessment, shall be entitled to vote at any district meeting. Every voter and every woman who has resided in the district forty days and is over twenty-one years of age, and who has children of school age residing in the district, shall be entitled to vote at any district meeting.

It is contended that, as the constitution fixes the qualifi-

cations of voters, and does not confer the elective franchise upon women, therefore the legislature had no authority to pass the act in question. An examination of the constitution will convince any one that the provisions in regard to elections were not intended to apply to school districts. The organization of district schools is one of the modes by which the state provides for the education of all persons residing therein between the ages of five and twenty-one years. The continued existence of free government depends to a great extent upon the intelligence, love of right, and good morals of the people. That women are successful educators is fully shown by experience, and the common law permitted them to fill any office of an administrative character the duties of which they were competent to discharge. *Opinion of the Judges*, 115 Mass., 602. The statute merely permits women possessing the necessary qualifications to have a voice in the choice of school officers, selection of teachers, and general management of schools. And being entitled to vote, they are also entitled to act as trustees. We have no doubt, therefore, that the act allowing women possessing the qualifications prescribed in the act to vote at school meetings is constitutional and valid. This question was before the supreme court of Kansas in *Wheeler v. Brady*, 15 Kas., 26, and it was held that the constitutional provision in regard to electors did not apply to school districts, and that the act allowing women to vote at school meetings was valid. To the same effect is the *Opinion of the Judges*, 115 Mass., 602. The second objection therefore is untenable.

The third objection is more serious. Sec. 1, subdivision 11 of the school law (Comp. St., 456), provides that "the annual school meeting of each school district *shall be held* at the school house, if there be one, or at some other suitable place within the district, on the first Monday of April of each year, and the school year shall commence on that day."

Sec. 8 provides for an adjournment from time to time

State v. Wish.

for the purpose of locating a site, but we find no authority to adjourn the election of officers. The fact that the school year dates from the day of the election tends to show the intention of the legislature to have the election take place at the time indicated, and we are not aware of any authority to postpone the same. We are of the opinion, therefore, that the election held on the fourth of May was a nullity, and that the defendant is the lawful treasurer of said school district. This being so, the information fails to state facts sufficient to entitle the relator to any relief, and it will be quashed. Motion sustained.

JUDGMENT ACCORDINGLY.

THE other judges concur.

15	448
16	602
28	674
15	448
45	733
15	448
50	133

THE STATE OF NEBRASKA V. PETER WISH.

Statutes: CONSTRUCTION. Where a new act is in the very words of a statute which it repeals, and it is clear that the repeal and re-enactment were intended to continue in force the uninterrupted operation of the old statute, they will be so construed. And this will apply to crimes committed before the new act took effect. *State v. McCall*, 9 Neb., 203. *Wright v. Oakley*, 5 Met., 406. *Fullerton v. Spring*, 3 Wis., 671.

BILL of exceptions from Antelope county on behalf of plaintiff, filed under secs. 515, 516, criminal code.

E. M. Coffin, district attorney, for the State.

D. A. Holmes, contra.

MAXWELL, J.

At the April, 1883, term of the district court of Antelope county, the defendant was indicted for stealing a horse

in that county on the twenty-seventh of March, 1883. On the thirteenth day of November, 1883, the defendant demurred to the indictment, upon the ground that the facts stated therein did not constitute an offense under the statute. The demurrer was sustained and the defendant discharged. The prosecuting attorney then applied for and obtained leave to file a petition in error in this court for the purpose of having the law determined. No objection is made to the form of the indictment, but it is claimed that the law for the punishment of horse stealing was repealed without a saving clause after the offense charged in the indictment was committed. The act to amend sec. 117 of the criminal code is as follows: "If any person shall steal any horse, mare, gelding, foal, or filly, ass or mule of any value; or if any person shall receive or buy any horse, mare, gelding, foal, or filly, ass or mule that shall have been stolen, knowing the same to have been stolen, with intent by such receiving or buying to defraud the owner; or if any person shall conceal any horse thief, knowing him to be such; or if any person shall conceal any horse, mare, or gelding, foal or filly, ass or mule, knowing the same to have been stolen; every person so offending shall be imprisoned in the penitentiary not more than *ten* years nor less than *one* year."

"Sec. 2. Section 117 of the criminal code of this state, as now existing, is hereby repealed."

"Approved February 27th, 1883." Laws 1883, p. 333.

The only difference between the original section and the one as amended is, in reducing the maximum imprisonment from fifteen years to ten years and the minimum from three years to one year. In all other respects the language of the section as amended is verbatim that of the original. The repeal of the original section was made in conformity to the provisions of section 11, art. III. of the constitution, which provides that "no law shall be amended unless the new act contains the section or sections so amended, and

the section or sections so amended shall be repealed." The object of this provision was to give certainty to the law by removing all apparently conflicting provisions. And this was the only purpose, as those familiar with the history of the legislation of the state well know.

The law as to an absolute repeal of a statute is well stated by Matthew Hale, as follows: "That when an offense is made treason or felony by an act of parliament, and then those acts are repealed, the offenses committed before such repeal and the proceeding thereupon are discharged by such repeal, and cannot be proceeded upon after such repeal unless a special clause in the act of repeal be made enabling such proceeding after the repeal for offenses committed before the repeal." Hale's Pleas of the Crown, vol. 1, 291. This would follow as a consequence, because certain acts being declared a felony by statute and to be punished in a certain manner therein provided, upon the repeal of the statute the authority to punish would be entirely taken away; that is, the authority being derived from the statute, upon its unconditional repeal the power ceases. But does this rule apply where in fact the statute has not been repealed? There would seem to be a material difference between repealing a statute and leaving nothing in its place, and simply repealing it so far as to avoid an apparent conflict between the original and amended sections of the act. In the one case the power would be entirely gone, while in the other no instant of time had passed between the repeal of the old act and the taking effect of the new.

The repealing act re-enacts the provisions of the old statute in its very language in all respects, except in reducing the imprisonment. We hold, therefore, that where the re-enactment is in the words of the old statute, and was evidently intended to continue in force the uninterrupted operation of such statute, that the new act or amendment is a mere continuation of the former act, and is not in a

Hartley v. Dorr & Co.

proper sense a repeal. *State v. McCull*, 9 Neb., 203. *Fullerton v. Spring*, 3 Wis., 671. *Wright v. Oakley*, 5 Met., 406. The demurrer should have been overruled.

THE other judges concur.

ELLIS T. HARTLEY, PLAINTIFF IN ERROR, V. JOHN P.
DORR & CO., DEFENDANTS IN ERROR.

1. **Finding of Court:** NEW TRIAL. A finding of the lower court will not be set aside and a new trial granted on the ground of a want of sufficient evidence to support it unless the want is so great as to show that the finding is manifestly wrong.
2. ———: **QUESTIONS OF FACT.** In cases tried to the court without a jury, the finding on questions of fact is entitled to the same respect in the supreme court as would be accorded to the verdict of a jury under like circumstances. *Cheney v. Eberhardt*, 8 Neb., 423.

ERROR to the district court for Lancaster county. Action to recover \$67.50 as commission on sale of a lot in city of Lincoln. Tried below before POUND, J.

Lamb, Ricketts & Wilson, for plaintiff in error.

L. W. Billingsley, for defendants in error.

REESE, J.

The only question presented in this case is, the sufficiency of the evidence to sustain the finding and judgment of the district court.

The cause was tried to the court without the intervention of a jury, and it has been held by this court that in such case the findings of the court are entitled to the same weight as a verdict of a jury, and will not be set aside on the

15	451
19	175
23	359
24	415

15	451
26	512

15	451
39	497

15	451
40	134

ground of an erroneous finding, unless it is clear that such is the case. *Seymour v. Street*, 5 Neb., 89. See also *Merrick v. Boury*, 4 Ohio State, 60. A mere difference of opinion between the court which tried the case and this court will not warrant the setting aside of the finding of the trial court and ordering a new trial, the correct rule being as stated in *Seymour v. Street, supra*, that if the verdict or finding is clearly wrong it should be set aside, otherwise not.

There is a conflict in the testimony in this case, but there is sufficient on the part of plaintiff to sustain the finding. The action was for commission alleged to be due a real estate broker, growing out of a sale of real estate. While the case is not a satisfactory one, and might have been decided otherwise, yet there is sufficient to sustain the finding of the court that Bittenbender, the purchaser, applied to Brown to ascertain if the property was for sale, and that Brown referred him to defendant in error, who was the agent of plaintiff in error, and that through the efforts of defendant in error the property was finally sold, although sold by Brown.

A new trial will not be granted by the supreme court on the ground of a want of sufficient evidence to support the finding, unless the want is so great as to show that the verdict is manifestly wrong. *Potvin v. Curran & Chase*, 13 Neb., 302.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

CHARLES O. SWAN, APPELLEE, V. MATTINE M. SWAN
APPELLANT.

15	453
24	893

1. **Witness: EXAMINATION IN CHIEF.** The method of examining witnesses by the use of leading and suggestive questions is not to be encouraged by the courts.
2. **Divorce: INSUFFICIENT EVIDENCE.** The evidence in this case examined, and *Held*, Not sufficient to sustain a decree for divorce.
3. ———: **SHOULD ONLY BE GRANTED IN MERITORIOUS CASES.** A decree of divorce should not be granted for light and trivial causes, but every party seeking a decree of divorce should be required to bring himself clearly within the provisions of the statute.
4. ———: **ABANDONMENT.** To sustain an action for divorce on the ground of abandonment, an intent to desert or abandon the plaintiff must actually exist in the mind of the defendant.

APPEAL from Buffalo county. Heard below before
GASLIN, J.

E. C. Calkins, for appellant.

A. H. Conner, for appellee.

REESE, J.

The plaintiff filed his petition for divorce in the district court of Buffalo county, alleging willful abandonment by the defendant. The defendant answered, denying any abandonment and presented a cross petition for divorce and alimony, alleging abandonment by the plaintiff. To this answer no reply was filed. A trial was had to the court, and a decree of divorce was rendered in favor of the plaintiff. The defendant appeals, and insists that the finding of the court that the defendant abandoned the plaintiff is against the weight of evidence, and that the decree should have been in favor of the defendant.

From a careful examination of the evidence adduced on the trial we are of the opinion that there is not sufficient evidence to sustain a decree in favor of either party. As the finding was against the defendant, which was correct, we will briefly notice the evidence adduced on the part of the plaintiff. In this connection we notice, also, the manner in which the testimony was presented to the court. For this purpose, as well as to show the force, or rather want of force of the plaintiff's testimony, we quote the examination in chief entire of the plaintiff when called to the witness stand the first time to testify in his own behalf:

Q. You are the plaintiff in this case?

A. Yes, sir.

Q. State whether you were married on or about the nineteenth of February, 1878?

A. I was.

Q. To the defendant here?

A. Yes, sir.

Q. State whether or not on or about the second day of November, 1879, she left you?

A. She did.

Q. Do you know where she went to?

A. She went to Dakota territory.

Q. State if ever since that time she has ever remained away from you against your consent? You have been willing to keep her if she would come and live with you?

A. Yes, sir.

Q. State if she has gone out there and stayed out there of her own will?

A. Yes, sir.

Q. You are not in business now?

A. No, sir.

Q. Have you got any means of your own?

A. No, sir, I have not.

The witness was then turned over to the defendant's counsel for cross-examination.

We deem it proper here to say that, in our opinion, this manner of examining a witness, especially when testifying in chief in his own behalf, cannot be too severely condemned. It violates almost every rule laid down by law writers for the examination in chief of witnesses, and almost destroys the force of what the witness does testify to, as nearly every answer given by the witness is simply his assent to the propositions contained in the interrogatory.

"The marriage relation should not be severed for slight and trivial causes. A party seeking a divorce should be required to bring his case clearly within the provisions of the statute. If he does so he is entitled to a divorce. If he fails to do this his action should be dismissed." *Brotherton v. Brotherton*, 12 Neb., 74. Applying this rule to the case at bar it is very apparent that no divorce should have been granted.

The evidence shows that soon after the marriage the plaintiff went to the home of the defendant to live, and on a certain occasion became violently sick. His wife caused a physician to be called. After he partially recovered, his father went to the house where he resided and removed him to his own home, but nothing was said about his wife accompanying him. The flimsy pretext is made that he was poisoned by his mother-in-law, but the testimony wholly fails to establish anything of the kind. The defendant continued to reside with her mother in the same town in which the plaintiff resided, and in the course of a few months after he went away she gave birth to a child. The plaintiff paid for the services of the physician who treated her in her confinement, but gave her no further attention, although she was in circumstances bordering on destitution. No nurse was procured for her by him, nor any suitable clothing for herself or child. It is true he testified that he had procured a home for her and she would not leave her mother and live with him, but it is also true that his testimony on this point is very unsatisfactory. It

simply amounts to a statement that he could get a house if she would come. No steps were taken to prepare a home for her, and in fact the proof shows that he had sold his furniture to his father about the time it was taken away from her, when he left her house. The testimony establishes the fact that the defendant was willing to live with him at all times, if he would provide a home and support for her. But that he has never done. One witness testifies that after the defendant had gone to reside with her mother, who had removed to Dakota after the separation, she visited her, and on her return brought a message from the defendant to the plaintiff that "if he would provide a home ever so humble she would come and live with him;" and in his testimony he admits receiving the message as testified to by the witness, but simply says, "She did not come." The testimony throughout fails to show any intent on the part of the defendant to abandon the plaintiff. She did not leave the neighborhood in which he resided until after her parents had gone, and when she found it necessary to go to them the plaintiff went to the depot with her, and she informed him that she was ready to live with him as soon as he procured a place for her.

It is claimed that certain remarks made by the defendant show that she did not intend to live with the plaintiff. One witness testifies that she stated at one time "that when her father got money enough her mother was going to Deadwood, and she was going with her, and no man could stand between her and her mother." Another says she said "that she would not stick to Charlie Swan, and that she would not leave her mother for the best man that ever lived." The witness who testified to the first of the above statements is the father of the plaintiff, but this evidence was stricken out by the court and is not before us. The other statement is denied by the defendant. We attach no importance to this declaration, if true. The circumstances under which the remark was made are in doubt, and it is

not unreasonable to suppose that the witness who testified to the fact was not the person of whom the defendant would make a confidant, and to whom she would expose the secrets of her own mind upon the subject of her domestic troubles.

To sustain this action, an intent to desert or abandon the plaintiff must actually exist in the mind of the defendant, and the marital relation of the parties must cease. 1 Bishop on Marriage and Divorce, § 777. The distance the parties may remove from each other is not material. Maxwell's Pleading and Practice, p. 657. The testimony in the case does not fill these requirements.

The decree of the district court is vacated, the decision reversed, and the cause is dismissed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

THE STATE OF NEBRASKA, EX REL. CHARLES J. NOBES,
PLAINTIFF, V. JOHN WALLICHS, AUDITOR, DEFEND-
ANT.

1. **Appropriation of Public Money.** The auditor of public accounts has no authority to draw his warrant upon the state treasury for money except in pursuance of a specific appropriation made by law.
2. ———. The act of Feb'y 28, 1883, entitled "An act making appropriations for the current expenses of the state government," etc., does not appropriate any money for the purpose of returning prisoners from the penitentiary to the counties in which they were convicted, for retrial.
3. **Compensation: SALARY TO COVER.** The warden or other officers of the penitentiary drawing a salary from the state are not entitled to any increase of compensation for services imposed by law in returning prisoners for retrial.

15	457
16	680
15	457
50	99
54	656

REESE, J.

This is an application to this court, in the exercise of its original jurisdiction, by the warden of the penitentiary for a writ of mandamus to the state auditor to compel him to draw his warrant on the state treasury for the sum of \$66.30, being the alleged expenses of returning two prisoners to the county jail of Adams county for retrial. To the application the respondent filed a general demurrer, upon the ground that the application fails to state facts sufficient to entitle the relator to the writ.

Section 514 of the criminal code makes it the duty of the warden of the penitentiary, in case a new trial of a convict be ordered, to forthwith cause the defendant to be taken and conducted to the county jail in the county where he was convicted, and there be delivered to the keeper of said jail. That being his duty, and the demurrer having admitted the facts alleged in the application for the writ, the only question requiring our present attention is, whether or not there has been an appropriation of the necessary funds to pay this expense.

Section 22 of article III. of the constitution of this state provides that, "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law." It is claimed by the relator that the appropriation has been made in the item of "Fugitives from justice, rewards, sheriffs' fees, etc.," found in the miscellaneous appropriations on page 362 of the session laws of 1883, and contained in "An act making appropriations for the current expenses of the state government for the years ending March 31st, 1884, and March 31st, 1885, and to pay miscellaneous items of indebtedness owing by the state of Nebraska," approved February 28, 1883. We think it clear that the appropriation fails to cover cases of this kind, and that the auditor can issue the warrant only in case of a "specific appropriation" being made to pay the expense.

This being the view of the court, it is apparent that the relator is not entitled to the relief sought, and the demurrer must be sustained.

While the foregoing may be sufficient to dispose of the question directly before the court, yet it is thought proper to call attention to the further consideration that section twelve on page 508, Compiled Statutes, fixes the salary of the warden at \$1,500, and that it being made his duty by law to return convicts for retrial, the only compensation which can be allowed him is the reimbursement of money actually and necessarily paid out by him in such return, and that no person, whether warden or guard, in the employment of the state at a fixed compensation or salary can be allowed any per diem or compensation for making the return of the persons so to be returned.

All the judges concur and the writ is

DENIED.

C. J. Dilworth, for the relator.

Isaac Powers, Jr., Attorney General, for the respondent.

SANFORD L. STURTEVANT ET AL., PLAINTIFFS IN ERROR,
v. THE STATE OF NEBRASKA, EX REL. ANSON L.
HAVENS, DEFENDANT IN ERROR.

1. **Infant: CUSTODY OF.** Where an infant child, eight months of age, is in the custody of its grandparents, its mother being dead, and it appearing that it would be more for the benefit of the infant to remain with them than to be put under the care of the father, the court will refuse to direct the infant to be delivered to him.
2. **Interest of Child only to be Considered.** In such a controversy for the custody of the child the order of the court should be made with a single reference to the best interests of such child.

15	459
30	627
15	459
37	574
15	459
44	746
15	459
56	162

ERROR to the district court for Merrick county. Tried below before Post, J.

W. H. Munger, James G. Reeder, and George D. Meiklejohn, for plaintiffs in error.

Harwood, Ames & Kelly and Ewing & Reinoehl, for defendant in error.

REESE, J.

This cause originated in the district court of Merrick county, where the defendant in error sued out a writ of *habeas corpus* for the purpose of procuring the custody of Ella Nettie Havens, his infant child, who was in the custody of the plaintiffs in error. A trial was had, and the court having stated its findings of fact and conclusions of law, and entered judgment against the plaintiffs in error, the case is brought into this court for review.

The findings of fact are as follows:

"1. The said Ella Nettie Havens, the child named in said writ, is the infant daughter of the relator and the grandchild of the respondents; that said child was born in Central City, Merrick county, Nebraska, on the twenty-sixth day of December, 1882, and is now eight months of age, and that the mother of said child, who was the wife of the relator and the daughter of the respondents, died on the sixth day of January, 1883, her death being caused by blood poisoning occasioned by the birth of said child.

"2. The relator is a man in every way well qualified and able to have and exercise the care and custody of said child; that he is possessed of ample means to raise, educate, and provide for her, and has procured a nurse to assist in the care and education of said child who is in every way well qualified and fitted for said trust.

"3. The respondents are also proper persons to have the care and education of said child; they have a suitable

home and are qualified and possessed of ample means and well fitted to nurse, educate, and care for her, and are desirous of raising and educating said child out of their own means, and are now greatly attached to her.

"4. During the last sickness of the relator's wife, and a few days before her death, and when said deceased as well as the relator and respondents expected her death soon to occur, the said wife asked the respondent S. L. Sturtevant to take said child and raise and care for it in all respects as his own; that said respondent agreed so to do, and answered said request in the affirmative; that the relator was present at said conversation and did not assent to or dissent from said proposition, but remained silent.

"5. The day following the funeral of the relator's wife respondents took said child, in good faith, with the knowledge and consent of the relator, from Central City to their home in Nance county, the relator at said time not being prepared to nurse or care for said child in his own house.

"6. That in taking said child to their home respondents claim to have acted upon the said request of the relator's wife.

"7. That said relator visited said child at the home of the respondents three different times between the eighth day of January, 1883, and the fifteenth day of April, 1883, but did not demand said child from respondents at any of said times.

"8. That about the fifteenth day of April, 1883, being in poor health and distressed in mind on account of the death of his wife, with the knowledge and by the advice of respondents said relator went east on a visit and did not return until June 18th, 1883, and a few days thereafter, to-wit, on the nineteenth day of June, 1883, he demanded said child from the respondents, who refused and have ever since refused to deliver her to the relator, but on the contrary have, ever since said date, detained said child contrary to the wish and demand of the relator.

"9. That the value of the respondents' services and money expended in caring for said child since January 8, 1883, is \$10 per week.

"10. That said relator is twenty-three years old and has no other children and no one depending upon him, and the respondents are both about forty-two years of age and have two daughters now living."

Conclusions of law :

"1. Said child, Ella Nettie Havens, is wrongfully and unlawfully restrained of her liberty by the respondents, S. L. Sturtevant and Hannah Sturtevant.

"2. The relator, Anson L. Havens, is entitled to the care, custody, companionship, and education of said Ella Nettie Havens."

The evidence is not preserved in the transcript, and the only question to be considered by the court is, whether or not the conclusions of law are sustained by the findings of fact.

Were the question of the *right* of the father the only question to be considered, we should, perhaps, coincide with the conclusions of law as stated by the district court. It is true this legal right was at one time, in the early history of our jurisprudence, fully recognized both by the courts of England and of this country; and it is, in part, made the law of this state by section 6, chapter 34 of the Compiled Statutes, which provides that, "The father of the minor, if living, and in case of his decease, the mother, while she remains unmarried, being themselves respectively competent to transact their own business, and not otherwise unsuitable, shall be entitled to the custody of the person of the minor and to care for his education."

Were this section alone to determine the rights of the parties, and were the rule here laid down an inflexible one, it would not only decide this case in favor of the defendant in error, but in a proper case it would deprive the mother of the control or education of her children, upon

the decease of the father and her remarriage, without any reference to the best interests of the children, and in that case it might be conceded that she was in every other respect worthy and qualified, that she had ample means and was greatly attached to her children, and her remarriage might place them in a better condition, morally, socially, and financially; and yet this section of the statute, if strictly followed by the courts, would override every consideration of the welfare of her children, take them from her and place them in the hands of strangers. Such could not have been the intention of the legislature which passed this section of the law. It is true that this section is declarative of the law in its general sense, but we cannot agree with the defendant's counsel and decide the cause upon the rule there laid down, unaided by recent judicial decisions or the circumstances of the case. But rather, taking our statute as a general guide, we will look to the particular necessities of the case and give our special attention to the best interests of the child about whom this unfortunate controversy has arisen.

In Schouler's Domestic Relations, section 248, it is said that, "The American rule is not, however, one of fixed and determined principles. Much must be left to the peculiar surroundings of each case." And see also *Cook v. Cook*, 1 Barb., Ch. 639. *Daily v. Daily*, Wright, 514. "The primary object of the American decisions is to secure the welfare of the child and not the special claims of one or the other parent," and "the cardinal principle relative to such matters is to regard the benefit of the infant, to make the welfare of the child paramount to either parent." Id.

In *The United States v. Green*, 3 Mason, 382, Judge Story uses the following language: "It is an entire mistake to suppose that the court is bound to deliver over the infant to its father, or that the latter has an absolute vested right in the custody" of such infant.

In the case of *Gishwiler v. Dodez*, 4 Ohio State, 617, the

supreme court of Ohio has held that "whatever difference of opinion may have obtained upon other points of this interesting and important subject, it is universally agreed that neither of the parents has any rights that can be made to conflict with the welfare of the child, and that the order of the court should be made with a single reference to its best interests."

In re Margaret Eliza Waldron, 13 Johnson, 419, it is said: "From the affidavits which have been laid before the court, little doubt can be entertained that it will be more for the benefit of the child to remain with her grandparents than to be put under the care and custody of her father; and if this court has any discretion in such case it will no doubt be discreetly exercised by permitting the child to remain where she is." The motion for the writ was denied. See also *Corrie v. Corrie*, 42 Mich., 509.

From a careful examination of the authorities at our command we think the prevailing rule in this country may be briefly stated to be, that in controversies similar to this, especially where the infant is of the tender age of the one contended for, the court will consider only the best interest of the child, and make such order for its custody as will be for its welfare, without any reference to the wishes of the parties.

Applying this rule to this case we are forced to the conclusion that the conclusions of law as stated by the district court are not sustained by the findings of fact, and that the judgment of the court should have been in favor of the plaintiffs in error.

It is no doubt true that the defendant in error is greatly attached to this child, and the facts as found by the court show that he is in every respect a suitable person to have its care and custody. But when we consider his age and want of experience, we are driven to the conclusion that, *personally* he could not care for the wants of a child so young and helpless. True he has means and has employed

a suitable nurse, yet so far as we are informed this nurse is a stranger to the child, and of course does not feel that personal interest in its welfare as would be felt by a near relative. The grandparents have had the custody of the child since its birth, are greatly attached to it, have ample means to provide for its wants, and have the judgment and experience so essentially necessary in rearing a child of its age.

It seems to us no further reasoning is necessary to convince anyone that it is better for the child to remain where it is until such time as its age and condition will justify the father in assuming its custody.

It is scarcely necessary to notice the contract which is alleged to have been made prior to the death of the wife of the defendant in error. Whatever influence this should have upon the action of the parties, as viewed from a moral standpoint, we are not inclined to give it any consideration at this time as affecting the duty of the court with reference to the present interests of the child.

The judgment of the district court is reversed, and the relation dismissed.

REVERSED AND DISMISSED.

THE other judges concur.

15	465
26	765

J. H. SWAN, PLAINTIFF IN ERROR, V. WM. HUSE & SON,
DEFENDANTS IN ERROR.

Fees of Printer Publishing Legal Notice. A printer publishing a notice required to be published by section 23 of the revenue law, is entitled to such compensation therefor as may be agreed upon by such printer and the person desiring such publication. If no compensation has been agreed upon, then such printer is entitled to a fair compensation for such printing and publication, to be alleged and proved as in other cases.

ERROR to the district court for Dixon county. Heard below before BARNES, J.

J. H. Swan, for plaintiff in error.

Gantt & Norris, for defendants in error.

COBB, CH. J.

This cause was submitted to the district court upon a stipulation of facts, which is set out in the following words:

"William Huse & Son claim to recover of J. H. Swan \$95 for services rendered to the said J. H. Swan, at his request, in printing in the *Northern Nebraska Journal*, a paper printed in Dixon county, Neb., the following described notices of purchase of town lots in the village of Ponca, Dixon county, Nebraska, at tax sale under the provisions of section 123 of the revenue laws of 1879, said notices being as follows:

"NOTICE OF PUBLICATION AT TAX SALE.

"Notice is hereby given that on the first day of November, A.D. 1880, each of the following described lots or parcels of land, to-wit: [Here follow ninety-five descriptions of lots, all in the town of Ponca, in the county of Dixon, state of Nebraska], taxed in the name of the Nebraska Land and Town Lot Company, and were duly and separately sold by the treasurer of Dixon county, state of Nebraska, in the manner provided by law, for the delinquent taxes on each thereof for the year 1879, and each of the same was then purchased by the undersigned, J. H. Swan, for said taxes, and that the time for redemption will expire thereon on the first day of November, A.D. 1882, unless sooner redeemed according to law.

"There being no special contract between the parties as to the price to be paid for the printing of said notices, the said Wm. Huse & Son claim that they are entitled to re-

cover for said services the sum of \$1 for each lot or description in said notice contained, and amounting to the sum of \$95. None of the admissions herein are to affect either party or to be used except for the purpose of this submission.

"The questions desired to be submitted are as follows:

"Whether the said William Huse & Son are entitled to recover, under section 125 of the revenue laws of 1879, the sum of \$1 for each lot or description contained in said notice and amounting to the sum of \$95, or under the statute allowing \$1 per square for legal advertising, in which case the services would amount to \$9. Said William Huse & Son to recover costs in case it is decided that they recover under section 125, and said J. H. Swan to recover costs in case it is decided that it is to be governed by statute fixing fees for legal notices at \$1 per square; each party reserving the right to appeal or to prosecute petition in error. Judgment to be entered in said case at chambers, and to be valid and binding to both parties thereto unless reversed on error or appeal."

Upon such submission the district court rendered judgment in favor of the defendants in error against the plaintiff in error for ninety-four (94) dollars and costs.

The following provisions of the statute are applicable to the question raised by this record:

Section 123 of the revenue law provides that: "Hereafter no purchaser or assignee of such purchaser of any land, town or city lot, at any sale of lands or lots for taxes or special assessments due either to the state or any county or any incorporated town or city within the same, or at any sale for taxes or levies authorized by the laws of this state, shall be entitled to a deed for the lands or lots so purchased, until the following conditions have been complied with, to-wit: Such purchaser or assignee shall serve or cause to be served a written or printed or partly written and partly printed notice of such purchase on every person

in actual possession or occupancy of such land or lot, and also the person in whose name the same was taxed or specially assessed, if upon diligent inquiry he can be found in the county, at least three months before the expiration of the time of redemption on such sale, in which notice he shall state when he purchased the land or lot, in whose name taxed, the description of the land or lot he has purchased, for what year taxed or specially assessed, and when the time of redemption will expire. If no person is in actual possession or occupancy of such land or lot, and the person in whose name the same was taxed or specially assessed, upon diligent inquiry, cannot be found in the county, then such person or his assignee shall publish such notice in some newspaper printed in such county," etc.

Section 124 provides: "That every such purchaser or assignee, by himself or agent, shall, before he shall be entitled to a deed, make an affidavit of his having complied with the conditions of the foregoing section, stating particularly the facts relied on as such compliance, which affidavit shall be delivered to the person authorized by law to execute such tax deed to be by such officer entered on the records of his office," etc.

Section 125 provides that: "In case any person shall be compelled to publish such notice in a newspaper, then before any person who may have a right to redeem such lands or lots from such sale shall be permitted to redeem, he shall pay the officer or person who by law is authorized to receive such redemption money the amount paid for printer's fee for publishing such notice, for the use of the person compelled to publish such notice as aforesaid. The fee for such publication shall not exceed \$1 for each tract or lot contained in such notice."

The one dollar here mentioned is not prescribed as the fee to which the printer shall be entitled, but is only a limitation upon the amount which the owner of the lot or land shall be compelled to pay, in addition to other moneys, as

a condition precedent to the redemption of the land. No printer is obliged to publish such notice for this fee. The purchaser of the land sold at tax sale, desiring to acquire the title, is in certain cases compelled to procure the publication of such notice. He may specially bargain for such publication at such price as may be agreed upon; if for less than one dollar per lot or tract, he would nevertheless be entitled to receive that from the person redeeming; if he is obliged to pay more he will necessarily lose the excess which he is obliged to pay above one dollar per tract or lot; and if he fails to make a special contract with the printer, the printer would be entitled to recover from him for such printing upon the *quantum meruit*, to be proved as in other cases, of services rendered; and such amount would, to no extent whatever, be governed by the provision of law above quoted. Whether it would be controlled by any other clause of the statute, prescribing a rate of printer's fees generally, it is not necessary to decide in this case.

The judgment of the district court is reversed, and the case remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

J. R. HENDRIX, PLAINTIFF IN ERROR, V. GEORGE H. BOGGS ET AL., DEFENDANTS IN ERROR.

15	489
16	548
20	845
15	489
34	195

1. **Wills.** The probate of a will and the issuing of letters testamentary are *prima facie* evidence of the death of the testator.
2. **Taxes: REDEMPTION FROM TAX SALE: NOTICE.** Notice of the time when the redemption of lands from tax sale will expire

must be given by the tax purchaser or his assignee before the expiration of the time to redeem.

3. ———: DEED: SEAL. Where the law requires a tax deed to be executed under the seal of the county treasurer, a scroll is not sufficient.

ERROR to the district court for Sarpy county. Tried below before NEVILLE, J.

Congdon, Clarkson & Hunt, for plaintiff in error, cited: 2 Wharton's Ev., § 1278. *Ins. Co. v. Tisdale*, 91 U. S., 238. *Carroll v. Carroll*, 60 N. Y., 123. *Carver v. Jackson*, 4 Peters, 1, 83. *Jones v. Sherman*, 56 Miss., 599. *Miller v. Hurford*, 13 Neb., 13. *Haller v. Blaco* (dissenting opinion), 10 Neb., 40.

W. J. Connell, for defendants in error, cited: *Taylor v. Courtney*, ante p. 190. 1 Greenleaf Ev., § 550. 3 Wash. Real Prop., 684. *Newman v. Jenkins*, 10 Pick., 516. *Cunningham v. Smith*, 70 Penn. State, 450. *Tisdall v. Ins. Co.*, 28 Iowa, 12.

MAXWELL, J.

This is an action of ejectment brought by Boggs against Hendrix to recover the possession of certain real estate in Sarpy county. Hendrix in his answer claims the land under a tax deed dated April 24th, 1877, and possession thereunder for more than three years. On the trial of the cause, however, no such deed was offered in evidence, but one dated January 25th, 1881, upon a sale which took place on the sixth of November, 1878. The deed was excluded, and judgment entered in favor of Boggs.

The errors relied upon in the brief of the plaintiff will be considered in their order:

1st. Boggs claims title to the premises through a deed from William Dorsheimer and wife and Elizabeth Clifton, heirs and devisees of one Philip Dorsheimer, who resided

in Erie county, New York, and where what purports to be his last will, devising said real estate to William Dorsheimer *et al.*, was admitted to probate. This will was afterwards admitted to probate in Sarpy county, and a copy thereof introduced in evidence.

It is claimed that this was error, without proof of the death of Philip Dorsheimer. There seems to be a conflict in the authorities, in this country at least, as to proof of the death by letters of administration. To some extent this conflict may be explained by the difference in the procedure at common law and under statutes. At common law the will itself is the primary evidence as to lands; therefore if there are several executors, though some of them are minors or have not proved the will, still all must join in an action. 3 Wash. R. P., 684.

But under our statute executors derive their title and authority from the letters testamentary, and only such as have taken out letters can join in an action—in other words, have the right to act as executors. In order to authorize a court to grant letters testamentary, a petition must be presented to it, alleging, among other things, the death of the testator, and the court before admitting the will to probate must so find. This is sufficient in the absence of any opposing proof. 1 Greenleaf Ev., § 550, and cases cited. The will was therefore properly admitted in evidence.

2. It is claimed that the court erred in sustaining the objections to the tax deed. There are fourteen of these, but two of which will be noticed, as they are fatal to the validity of the deed. *First*, That no proof was offered showing that notice had been given to occupants of the lands of the time when the redemption would expire.

Sec. 3, art. IX. of the constitution, provides: "That occupants shall in all cases be served with personal notice before the time for redemption expires." This provision is mandatory, and applies to all sales which took place after the con-

stitution of 1875 took effect. And it devolves on the purchaser at tax sale or his assignee to give the notice. The statute of 1879 makes the tax deed, in the form provided by statute, evidence of the service of notice or publication. But the deed in question does not state that the holder of the certificate has complied with the laws of the state to entitle him to a deed, or words to that effect, therefore the proof that notice was duly given devolves on him. The notice to be effectual, also, to entitle a party to a deed, must be given before the time to redeem expires. Neither of these facts appear, and the failure is fatal to the tax deed. The statute also requires the treasurer to execute the deed under his seal. This is not a scroll but the seal of his office. No seal was attached to the deed in this case. The plaintiff is entitled to foreclose his lien for taxes, but as he has not sought that relief in this case it cannot be granted.

There is no error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

15	472
34	874

THE STATE OF NEBRASKA, PLAINTIFF IN ERROR, V.
STEPHEN SINNOTT, DEFENDANT IN ERROR.

Liquors: SALE ON SUNDAY. Persons who shall sell or give away any malt, spirituous, or vinous liquors on the day of any general or special election, or at any time during the first day of the week, commonly called Sunday, may be punished therefor to the extent provided in section 14, chapter 50, Compiled Statutes, by indictment.

BILL of exceptions from Dakota county, BARNES, J., presiding, brought to this court under the provisions of section 515, criminal code.

Wilbur F. Bryant, for the State, cited: *U. S. v. Bough*, 6 McLean, 277. *State v. Fletcher*, 5 N. H., 257. *Rex v. Robison*, 2 Burrows, 799.

COBB, CH. J.

The defendant in error was indicted for selling liquors on Sunday. He demurred to the indictment. His demurrer was sustained by the district court and the defendant discharged. The cause is brought to this court by the district attorney on behalf of the people of the state for the purpose of settling the law of the case.

The indictment charges that Stephen Sinnott, late of the county aforesaid, on the first day of April in the year of our Lord one thousand eight hundred and eighty-three, in the county of Dakota, Nebraska, aforesaid, unlawfully and knowingly did sell for money, to-wit, ten cents, a certain spirituous liquor, to-wit, whiskey, during the first day of the week, commonly called Sunday, to one Benjamin Sawyer, then and there being, etc.

The indictment was found under the provisions of section 14 of chapter 50 of the Compiled Statutes, which reads as follows: "Every person who shall sell or give away any malt, spirituous, and vinous liquors on the day of any general or special election, or at any time during the first day of the week, commonly called Sunday, shall forfeit and pay for every such offense the sum of one hundred dollars."

The question presented for our consideration and decision is: Can this law be enforced by indictment?

I have long understood the two following propositions to be well settled:

1. Where a statute creates an offense or declares a penalty or forfeiture, and also provides a method of punishing such offense or of enforcing such penalty or forfeiture, such method is exclusive of all others.

2. Where a statute creates an offense or declares a pen-

alty or forfeiture, but provides no method of punishing such offense, or of enforcing such penalty or forfeiture, the same may be punished or enforced by indictment. Bish. on Stat. Crimes, § 250.

The section above quoted both creates an offense and declares a penalty and forfeiture. But it contains no provision for the punishment of the one or the enforcement of the other.

It may be said that as all penalties and forfeitures are declared by the constitution to belong to the school fund, that it is the duty of some officer or conservator of such fund to collect for such fund all moneys forfeited thereto by violations of the statute now under consideration, and that therefore, as the statute may be enforced by civil process, that remedy must be deemed to be exclusive of any other. I know of no rule of construction that necessarily leads to this result. Besides, every person of observation knows that the law has not been and will not be enforced by civil process; and it should be borne in mind that the object of this statute was not to replenish the school fund. That it may do so is a mere incident resulting from one of a series of provisions of very doubtful merit, in my opinion, which seem to make the conservators and beneficiaries of the school fund the gainers by the violation of nearly every law for the protection of the public morals.

The object of this statute is to preserve the purity of the ballot box, so far as the law applies to election days, and so far as it applies to "the first day of the week commonly called Sunday," to preserve from desecration "the American Sabbath," an institution to which, perhaps beyond all others, we owe whatever is good of our national character. Beside these considerations the acquisition of a few dollars to our already munificently endowed school fund becomes a matter of the merest insignificance. And it is to conserve such purposes as these that the grand jury system is retained and held to be still necessary under our form of government.

I do not base this opinion so much upon adjudicated cases as upon the evident intent and meaning of the statute and considerations necessary to its enforcement. But this view is nevertheless sustained by cases from courts of high authority cited by counsel for plaintiff in error, but one of which will be examined. The case of the *United States v. James Bough*, 6 McLean, 277, arose upon a federal statute which provided that, "it shall be unlawful for any person to employ or any person to serve as an engineer or pilot on any steamboat used for the conveyance of passengers, who has not procured a license from the inspectors for that purpose;" and it provides that any one violating this provision shall forfeit one hundred dollars for each offense. I quote a portion of the opinion of the court by Judge Leavitt: "I suppose, however, that it is hardly a controvertible proposition, that upon the facts alleged in the declaration the defendant could have been prosecuted by indictment, although the statute does not authorize it in terms. The statute makes it an offense for any one to employ an engineer or pilot on a steamboat or for any person to serve in such capacity without a license, and subjects the party offending to a penalty of one hundred dollars. It is silent as to the manner of prosecuting for the penalties, except that the forty-first section confers upon an informer a right to sue in debt in any case arising under the statute in which a penalty has been incurred. But if no one chooses to avail himself of his right, by instituting a suit, the guilty person may be proceeded against by indictment. In all cases where an act is declared to be unlawful, and a punishment or penalty is annexed to the doing of the act, it pertains to the sovereignty of the state, through the agency of the judicial department, to punish it by indictment; and it does not require any express statutory authority as the warrant for such a proceeding."

I will only add that the office of informer, or person who voluntarily prosecutes in a civil action in the name of the

state for a penalty or forfeiture and is entitled to a moiety of whatever may be collected by means of such prosecution, is well known in the legislation of England and of our congress, but is not known to the constitution or laws of our state, nor would it be tolerated by the sentiment of our people.

The demurrer in the district court should have been overruled and the defendant put upon his trial.

THE other judges concur.

15	476
37	671

JOHN SULLIVAN, PLAINTIFF IN ERROR, v. GEORGE L. SMITH, ASSIGNEE OF HENNIGEN AND ASHTON, DEFENDANT IN ERROR.

1. **Assignment: SUBSEQUENT FRAUD.** Where a valid assignment is made for the benefit of creditors, no fraudulent act of the assignor after the taking effect of such assignment will vitiate it. Nor will a failure on the part of the assignee to account for money or property of the assigned estate have that effect.
2. —: **POSSESSION OF ASSIGNED ESTATE.** It is necessary for the assignee to take possession of the assigned estate, but so far as the formal act of taking possession is concerned, no stricter rule applies than in case of ordinary purchase. A formal delivery of the keys to storehouses, safe, and shops, accompanied by a pointing out and surrender of possession of stock in pens, horses, harness, wagon, etc., in barns, is sufficient.
3. —: **PARTNER MAY EXECUTE.** One of two partners, with the consent of the other, may convey real estate of the firm by an assignment in the name of the firm.
4. —: **CONSENT, WHAT IS.** Where one of two partners absconds, taking with him the available funds of the firm, leaving it insolvent and in the exclusive control of the other partner, this will imply consent on the part of the absconding partner to any sale, conveyance, or assignment of the partnership property by the remaining partner, which may be necessary for the payment of partnership debts.

ERROR to the district court for Seward county. Tried below before GEORGE W. POST, J.

Hastings & McGintie, for plaintiff in error, cited: *Burrill* on Assignments, 113. *Collyer* on Partnership, § 394. *Story*, § 101. *Hughes v. Ellison*, 5 Mo., 463. *Holland v. Drake*, 29 Ohio State, 441. *Heelan v. Hoagland*, 10 Neb., 511.

D. C. McKillip and *John H. Ames*, for defendant in error, cited: *Deckard v. Case*, 5 Watts, 24. *Kelly v. Baker*, 2 Hilton, 531. *Palmer v. Myers*, 43 Barb., 509. *Rumery v. McCulloch*, 54 Wis., 565. *National Bank v. Sackett*, 2 Daly, 395.

REESE, J.

This is an action of replevin instituted by the defendant in error, the assignee of Hennigen and Ashton, against the plaintiff in error, in the district court of Seward county. No replevin bond having been given, the property was returned to the defendant below, and the action was prosecuted as one for damages, under the provisions of section 193 of the civil code. The plaintiff in error, being the sheriff of Seward county, and having the property in his possession under an order of attachment, released it to the attachment defendant, but a judgment having been afterwards rendered in favor of the plaintiff in the action in which the attachment had issued, and an execution having been issued, the property was retaken by him, levied upon, and sold. The defendant in error claimed said property by virtue of an assignment made to him before the levy by the firm of Hennigen and Ashton, who were the owners of the property and were insolvent. By agreement of the parties, the cause was referred to E. J. Hainer, Esq., to take the testimony and report the facts. A trial was had

before the referee. The facts found by him and reported to the district court were, substantially, that on the fourteenth day of October, 1880, Peter Hennigen and W. H. Ashton were, and had been since January 1st, 1879, engaged in business as partners, in Seward, in the business of pork packing, shipping live stock, and dealing in meats; and that on the seventh day of October, 1880, Hennigen, without the knowledge or consent of Ashton, absconded, taking with him the proceeds of a shipment of hogs, amounting to the sum of \$4,000, the property of the firm, and leaving the firm insolvent, and that he thereafter ceased to act as a member of said firm; that on the fourteenth day of October, 1880, said firm were possessed of both personal and real property, the title to a part of the real estate appearing of record in the name of Hennigen and a part in the name of Ashton, and none of it was in the name of the firm. On the last named date, Ashton, after making diligent inquiry for Hennigen but failing to ascertain anything of his whereabouts, in the name of and as sole surviving member of said firm, executed and delivered to the defendant in error a deed of general assignment of all the property of said firm for the benefit of its creditors. At this time the attachment by which the property in dispute was levied upon had been issued, and it was apparent that more would follow, and that unless the property was secured to the creditors much of it would be consumed in litigation between rival creditors, but that a majority of the creditors had knowledge that an assignment was about to be made and none objected thereto; that the assignment was made in good faith for the purpose of avoiding attachments and to secure a fair distribution of the firm property among the creditors; that the assignee duly qualified and took possession of all the property, including the property in dispute, and caused it to be inventoried and appraised; but that a portion of the property, amounting in value to the sum of \$140, was inadvertently omitted from the appraise-

ment and inventory, and was afterwards, without the knowledge of the assignee, fraudulently appropriated by the assignor to his own use; and that twenty-three head of cattle which were turned over to the assignee were not inventoried or appraised, and on the third day of May, 1881, the defendant in error fraudulently turned them out to be levied upon by an individual creditor of Hennigen, and no account of them had been rendered by the assignee; that in accepting and entering upon the trust created by the assignment, the assignee acted in good faith and with the *bona fide* intention of carrying out the terms of the assignment, without fraud or collusion and for the best interests of all concerned; and that the value of the property in dispute in this action was five hundred dollars.

Upon these findings of fact the court found, as conclusions of law, that at the time of the commencement of the action the right of property and the right of possession of the property in dispute were in the plaintiff (defendant in error), and that said property was unlawfully detained by the defendant (plaintiff in error), and that the plaintiff (defendant in error) was entitled to judgment for the value thereof. Whereupon judgment was rendered in favor of the defendant in error for the sum of \$500.

The plaintiff in error assigns a number of alleged errors, which we will notice briefly in their order as presented in his brief.

It is insisted that the report of the referee is inconsistent and shows that the assignment was fraudulent, and that the report is not sustained by the evidence. In support of this, we are cited to the findings of the referee, that the assignment was made and accepted in good faith, but that afterwards the assignor fraudulently converted the property which had been overlooked, and that the assignee fraudulently relinquished his title to the twenty-three head of cattle some six months or more after accepting the assignment. It seems to us that it needs no argument or

citation of authorities to convince any person that the plaintiff's position cannot be sustained. No act of the assignor, however fraudulent, after the assignment, could affect it or the rights of others thereunder, and if the assignee has failed to properly discharge his duty he is liable on his bond to the extent of his failure, and the assignment itself cannot be impaired by his subsequent misconduct. Whether or not there was such misconduct cannot be decided in this action, as it is claimed by the assignee that the cattle did not belong to the firm of Hennigen and Ashton.

It is next claimed that the finding of the referee, that the defendant in error took possession of the property and caused it to be inventoried, appraised, etc., is contrary to the evidence. We do not so regard it. The evidence shows that a part of the assigned property was real estate and part personal property, consisting of hogs, corn in the field, a team of ponies, wagon, and harness, and other personal property usually kept about the slaughter house and necessary to carry on the business; that the keys to the storehouse, shop, and safe were delivered to the assignee, and the stock and other personal property were identified and set off to him; that it was necessary to gather the corn with which to feed the hogs and other stock until they could be disposed of. Immediately after the assignment the sheriff levied his writ of attachment upon the property and claimed the possession. By an agreement between the assignee and one Frank Ashton and the sheriff, Frank Ashton and his brother, the assignor, were hired to take care of the stock and other property, where they were, until such time as the property might be sold. The assignment being made by the firm of Hennigen and Ashton, we can see no impropriety in the assignee employing W. H. Ashton and his brother thus to care for the property. The delivery to the assignee was sufficient.

On the cross-examination of W. H. Ashton by the plaintiff in error, it was sought to be shown by him that the

assigned property was not all delivered to the assignee. Upon objection this was excluded by the referee, and the plaintiff insists that this ruling was erroneous. It is not necessary here to examine this question, as, if it was error, it was without prejudice, as the matter was afterwards fully testified to by the witness.

The record discloses that the assignment was made by Ashton alone, acting for the firm of Hennigen and Ashton, and the plaintiff in error insists that such an assignment could not be thus made, or rather that one partner cannot without the consent of his copartners make a valid assignment of the partnership property, especially when the property so assigned consists in whole or in part of real estate, the legal title to which is held by the partner who does not join in or assent to the assignment, and that under the rule declared in *Heelan v. Hoagland*, 10 Neb., 511, there being no power to convey real estate, the whole assignment must fall.

On these questions there is a conflict of opinion among text writers and courts of last resort. But we think, from a careful examination of the authorities at our command, it is pretty generally conceded that whether the partnership assets consist of personal or real property, one partner may assign the property of the firm for the payment of firm debts when the other partner has relinquished all control of the partnership affairs and consents to such assignment; and if he absconds, leaving the business in the hands of the remaining partner, this will be regarded as evidence of consent and of authority to the remaining partner to make such assignment, and where the absence of the partner is coupled with circumstances tending to show such authority, especially where the assignment is made without preferences, or in an extraordinary emergency, the assignment will be sustained. Burrill on Assignments, § 86. Parsons on Partnership, 166. *Rumery v. McCulloch*, 54 Wis., 565.

The evidence and finding of the referee show clearly that Hennigen absconded, taking with him from four to five thousand dollars, being all the available funds of the firm, and leaving Ashton to make such arrangements with the firm creditors as he could, or in case of his failing to do so the firm property might be squandered in litigation, and but few of the firm debts be paid. Ashton, by the employment of the telegraph and detectives, sought to ascertain his whereabouts, but failed. Creditors, as Hennigen must have expected, were clamoring for their money. Attachments were being issued, and it was very apparent that the resources of the firm would be exhausted in the payment of costs unless some transfer could be made to avoid it. It cannot be doubted that Ashton, being thus left by Hennigen to manage the affairs of the firm, might have sold any of the property, real or personal, in payment of the firm debts. Then why can he not sell or assign it, to be applied *pro rata* upon those debts? It was evident from the start that the personal property would be inadequate to pay them. The real estate must go sooner or later.

In *Dupuy v. Leavenworth*, 17 Cal., 263, Shelley, one of the firm of Norris & Shelley, had absconded, leaving both real and personal property in the possession of Norris, his partner. Norris sold the personal property and transferred the real estate to Davis by the firm name of Morris and Shelley, who conveyed to the plaintiff. Afterward Shelley returned, and conveyed his interest in the real estate to Baker, one of the defendants. Field, Ch. J., in writing the opinion of the court, says: "The real and beneficial interest which each partner possesses in the partnership property is the balance coming to him after the payment of the partnership debts and the settlement of accounts with his copartners. And in view of equity it is immaterial in whose name the legal title of the property stands, whether in the individual name of one copartner or in the joint names of all. * * * * The possessor of the

legal title in such case holds the estate in trust for the purposes of the copartnership. Each partner has the equitable interest in the property until such purposes are accomplished. Upon the dissolution of the copartnership by the death of one of its members, the surviving partner, who is charged with the duty of paying the debts, can dispose of the equitable interest, and the purchaser can compel the heirs at law of the deceased partner to perfect the purchase by the conveyance of the legal title. *Andrew's Heirs v. Brown's Adm'r.*, 21 Ala., 443. *Delmonico v. Guillaume*, 2 Sand. Ch., 367. Under the special circumstances of this case—Shelley having absconded with all the available funds of the firm, leaving Norris without sufficient means to pay the debts of the copartnership, and the personal property having been in good faith first exhausted and found to be insufficient—it is not perceived why the same rule which governs as to the authority of the surviving partner should not apply. We think it does apply; and that, under the circumstances stated, the equitable right and interest to the one undivided half the legal title to which stood in Shelley's name, passed by the conveyance to Davis."

In *Rumery v. McCulloch*, 54 Wis., 565, the supreme court of Wisconsin held, citing authorities, that an assignment by one member of a firm, made after a former ineffectual assignment by both partners, was sufficient to convey the real estate of the firm, the former assignment being held to imply authority and consent that the assignment in question should be made.

In Parsons on Partnership, page 166, it is stated that the weight of authority sanctions the right of one partner to assign the whole property in trust for all the creditors, especially if done without any preferences of any kind. And in a note to this text he says: "As to what is actually established by the cases, it seems to be pretty generally admitted and laid down that one partner may make a valid

general assignment of all the partnership property to trustees for creditors, if such act is justified by the situation of the firm at the time, and if the other partners are absent from the country or have made the assignor sole managing partner, or if in any way expressly or by implication they may be supposed to have conferred upon the assigning partner sufficiently extensive authority." In support of this, many authorities are cited by the author.

We therefore conclude that, under the circumstances of the case, Ashton had the right and implied authority to make the assignment in question, conveying both real and personal property, and that said assignment conveyed to the assignee the property in dispute, and that the finding of the referee and the decision of the district court should be sustained. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

19-607

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STEPHEN BINFIELD, PLAINTIFF IN ERROR, V. THE STATE
OF NEBRASKA.

1. **Practice in Criminal Cases.** In the trial of criminal cases, it is a matter of discretion on the part of the court whether it will or not order that the witnesses be examined out of the hearing of each other.
2. **Dying Declarations.** In the case at bar, the dying declarations of the deceased were properly admitted.
3. **Homicide: THREATS OF DECEASED.** Upon the trial of a case of homicide, proof of threats made by deceased against the accused, but which had not been communicated to him at the time of the homicide, should only be admitted when the making of such threats, or a state of feeling toward the accused on the part of the deceased as expressed by such threats, may tend to illus-

Binfield v. State.

trate or explain some act of the deceased, which in some view might tend to justify or excuse such homicide.

4. **Instruction.** It is not error on the part of the court to refuse to give an instruction, however faultless in point of law, when the same in substance and almost in the same language has already been given.
5. **Evidence.** The unsupported testimony of the accused in a criminal case, which the jury do not believe, cannot be said to furnish an hypothesis consistent with the innocence of the accused.
6. ———: **NAME.** The name which a man "always went by," which he declares is his name in his dying declaration, and by which his own mother knew him, may be deemed his right name although one witness has testified that it was not "his right name."
7. ———: **PLACE OF DECEASE.** Where the evidence shows that the deceased was shot in H. county, taken to the house of his step-father a half mile away, kept there a few days, and taken to the house of Mrs. P., across one channel of Platte river, so as to be more convenient to his attending physician, at which latter place he died, proof that the death actually occurred in H. county will not be required.

ERROR to the district court for Hall county. Indictment for murder in the second degree. Verdict—manslaughter. Sentence—ten years in penitentiary. Trial before NORVAL, J.

Thummel & Platt and *T. O. C. Harrison*, for plaintiff in error.

Keeping witnesses separate and apart. *Comp. Stat.*, 713. Dying declarations. 1 *Greenleaf Ev.*, § 158. *Rakes v. People*, 2 Neb., 157. *Starkey v. People*, 17 Ill., 17. *Montgomery v. State*, 11 Ohio, 424. *People v. Phillips*, 1 Park. Cr., 306. Uncommunicated threats. *Holler v. State*, 37 Ind., 57. *Horrigan & Thompson Cases on Self Defense*, 490. *Stokes v. People*, 53 N. Y., 164. Evidence. *Horne v. State*, 1 Kan., 42. *State v. Collins*, 20 Iowa, 85. *French v. State*, 12 Ind., 670. *State v. Waterman*, 1 Nev.,

Binfield v. State.

543. Variance in name. 1 Wharton, 256-8. Roscoe Cr. Ev., 81. *State v. Curran*, 18 Mo., 320.

Isaac Powers, Jr., Attorney General, for the State.

Dying declaration. *Fitzgerald v. State*, 11 Neb., 577. *Robbins v. The State*, 8 Ohio State, 131. Uncommunicated threats. *Powell v. State*, 19 Ala., 577. *People v. Henderson*, 28 Cal., 465. *Combs v. State*, 75 Ind., 215. Variance. *State v. Gardiner*, Wright's Rep., 392. Crim. Code, § 483.

COBB, CH. J.

The first point made by plaintiff in his brief is, that "the court erred in overruling the motion of plaintiff in error for the exclusion of the witnesses of the state and defendant, and to keep them separate and apart," and he cites sec. 301, p. 713, Comp. Stat. This section provides as follows: "The magistrate, if requested, or if he sees good cause therefor, shall order that the witnesses on both sides shall be examined, each one separate from all the others, and that the witnesses for may be kept separate from the witnesses against the accused during the examination." It can scarcely be seriously contended that the provisions of this section apply to trials in the district court. Its language expressly refers to "the magistrate," and it is one of the sections of a chapter of the criminal code entitled, "Adjournment and examination before a magistrate." Section 248, p. 705, provides that "the term 'magistrate' in this code, when not otherwise expressly stated, is used to mean a justice of the peace, probate judge, mayor of a city or incorporated village, or police judge." So that the above provision applies only to inferior judicial officers holding courts of examination for the purpose of committing offenders, or of holding them to bail, and does not apply to trials in the district court. Our statute, I think, is quite

silent as to the duty of the district court in case of an application of this character.

Upon this subject the law is thus stated by Greenleaf in his work on Evidence, sec. 432: "If the judge deems it essential to the discovery of truth that the witnesses should be *examined out of the hearing of each other*, he will so order it. This order, upon the motion or suggestion of either party, is rarely withheld; but, by the weight of authority, the party does not seem entitled to it as a matter of right." In this also agree all of the cases which I have been able to find, except in the cases where the matter is regulated by express statute. See *State v. Fitzsimmons*, 30 Mo., 236. *Benaway v. Conyne*, 3 Chand. (Wis.), 214. And *Erissman v. Erissman*, 25 Ills., 136.

The second point is, that "the court erred in admitting the dying declaration of Wendall Tillman to be read in evidence." I quite agree with counsel that "dying declarations to be used in evidence must be made not only in *articulo mortis*, but under the sense of impending death, and that the party was of such a state of mind that he had a clear understanding of the contents of the document that he is said to have signed, and can only be used when death is the subject of the charge, and the circumstances of the death the subject of the declaration." But I fail to see, nor is it pointed out, in what respect the proof fails to bring this case within the rule as above stated, or as laid down in any of the authorities cited. I have some doubt as to whether a dying declaration should be received, when every fact therein contained has already been testified to by living witnesses, and where there is scarcely any conflict in the testimony as to those facts. But in no other point of view can there be the least doubt as to the admissibility of the declaration of the deceased in this case.

The third point made is, that the court erred in refusing to admit the testimony of William Hohman as to uncommunicated threats made by the deceased against the defendant Binfield.

I understand the cases, where uncommunicated threats have been admitted in evidence, or most of them, to turn upon the question of self-defense. Indeed, the same might be said of evidence of threats generally, whether communicated or uncommunicated. To prove to the jury in a homicide case that the deceased had threatened to take the life of the prisoner, or to inflict great personal injury upon him, is to give them a key for the interpretation of the acts and motives of the prisoner and of the deceased, in cases where such threats had been previously communicated to the prisoner, and of the acts and motives of the deceased whether the threats had been communicated or not. In many cases the appearance of being driven to the wall, of a man who had lately threatened the life of his adversary, might be looked upon with just suspicion, when in the absence of such threats it would not be, and this without regard to whether such threat had been communicated to the party or not. In the case at bar there was no evidence of any act on the part of deceased to be illustrated by evidence of threats on his part towards the prisoner. As I understand the law, it would have been no error on the part of the court to have excluded even the communicated threats in this case, because upon the facts proved, the making of the threats furnished no possible justification or excuse for the homicide, nor tended to illustrate or explain acts of the deceased in such a way as to furnish any justification or excuse therefor.

The fourth point is, that the court erred in refusing to give in charge to the jury the No. 7 of defendant's prayers. Said prayer was in the following words:

"No 7. That it is incumbent upon the state, in order to sustain the charge, to prove beyond a reasonable doubt that the specific intent there charged actually and in fact existed in the mind of the defendant at the time he committed the act, that it is incumbent upon the state, if it would establish an intent to kill, to prove beyond a rea-

sonable doubt that at the time he committed the act the defendant in fact intended to take life." While I find no fault with the principle set out in the above prayer, I think that its language would be well calculated to mislead a jury. But were there no objection to its language, the refusal to give it cannot be urged as error on the part of the court, because the same principles of law were contained in the charge already given. The charge of the court to the jury is too lengthy to be reproduced here, covering at least twelve pages of legal cap in fine hand. It contains every principle of law necessary to the proper guidance of the jury in the case, and meets our approval.

Under the fifth head are grouped several alleged errors, under the general designation of error in refusing to grant a new trial.

1. "To warrant a conviction in a criminal case, the evidence should exclude every other reasonable hypothesis other than the defendant's guilt." This proposition will not be disputed. But it must be borne in mind that everything that may be sworn to by a witness or a party, is not necessarily evidence. The plaintiff in error himself testified that he took the loaded needle gun from the wagon and rode after the fleeing deceased for the purpose of compelling him to give up the whip, which deceased had taken away from him that morning. Upon coming up with him, deceased turned his pony's head around, and they were so close together that their ponies' heads might have touched each other; that the accused cocked his gun, pointed it at deceased, demanded his whip, and threatened to shoot him, when the gun went off accidentally and shot the deceased. This, it is urged, furnishes a reasonable hypothesis consistent with the innocence of the accused. Of course, if the jury believed the statement of the accused, that the gun went off accidentally, that he never intended to fire, that he did not pull the trigger, they could not find him guilty. But they had a right to disbelieve him; and, under the

circumstances, it was impossible for them to believe that part of his statement which, if true, could be known to none but him, and, if false, could be disproved by no direct testimony. Not being believed by the jury, this testimony furnished no evidence of any hypothesis whatever.

2. "For the reason that a fatal variance occurred between the name of the deceased in the indictment and the proof." There was one witness who, upon his cross-examination, testified that the right name of deceased was "*John Wendell C. Sower*, but that he always went by the name *Wendell Tillman*." In his dying declaration he called himself by the latter name, and by that name his own mother seems to have known him. How any other than that by which he always went, and by which his own mother knew him, come to be his right name does not appear. The jury had sufficient evidence before them to sustain their verdict in respect to the name of the victim, as well as the other ingredients of the offense.

3. "That the state failed to prove that the deceased died in Hall county." The evidence before the jury was, I think, sufficient to sustain the verdict on that point, even were there no doubt of the proposition, that in order to sustain the indictment, the state must prove that the deceased died in Hall county. There is positive and undisputed testimony that the deceased was shot in Hall county. The witness, Mrs. Taylor, deceased's mother, after testifying to going out after him, where he was shot, and meeting the Bunsons bringing him in their wagon, that they arrived at her house, is asked how long he was kept there; to which she answered, about three weeks. She was then asked "What did they do with him then?" Her answer was, "He was taken to Mrs. Powell's, because the river was coming up, and the doctor did not like to cross." To the question, "How did you move him?" she answered, "We put him in the bed of a wagon." She further an-

swered that he lived about nine days after they took him there, and died on the second day of June.

Ernest Reiland testified that he knew the deceased in his life time; that he died at the residence of Mrs. Martha Powell, on the second day of June, 1882. His examination continued as follows:

Q. Was you present at the time of his death?

A. Yes, sir.

Q. State how frequently you was with him during his confinement.

A. From the start, when he was on the island I was with him every other day, and at the residence of Mrs. Martha Powell I was with him all the time, etc.

I think that no witness testified directly that Mrs. Martha Powell's residence was in Hall county. The witness, Thomas A. Evans, testified that her residence was about four miles from Wood River Station. All of the witnesses in the case were residents of Hall county. Many of them testify to having visited deceased almost or quite daily while at Mrs. Powell's house.

The only principle of law which occurs to me as controlling this objection is, that when a certain status is proved to exist as to a person or thing, such status will be presumed to continue until the contrary be shown. The deceased having been proved to have been shot in Hall county, although there is proof of his having been removed from the house of his step-father to the house of Mrs. Powell, so as to be more convenient to his attending physician, in the absence of any evidence to the contrary it must be presumed, and the jury were justified in finding, that he remained within the limits of Hall county until his death.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

E. R. DEAN, PLAINTIFF IN ERROR, v. JOSEPH R. KINMAN, DEFENDANT IN ERROR. .

1. **Justice of peace: APPEAL.** In an action before a justice of the peace, the defendant appeared specially and objected to the jurisdiction of the justice. The objection was overruled, and the defendant not appearing further, judgment was rendered against him. He then filed an undertaking for an appeal which was duly approved. Afterwards he filed a motion to set aside the default, which was sustained, and the plaintiff not appearing to prosecute, the action was dismissed. *Held*, That after an appeal was taken by a party and pending, the justice could not set the judgment aside on the motion of such party.
2. **Jurisdiction.** Where judgment is taken by default, an appeal taken to the district court by the party in default, and the transcript is filed in the district court by the appellee, he thereby waives objection to the jurisdiction.

ERROR to the district court for Butler county. Tried below before NORVAL, J.

E. R. Dean, pro se.

Myers & Evans and Horace Garfield, for defendant in error.

MAXWELL, J.

The plaintiff brought an action against the defendant before a justice of the peace to recover the sum of \$199. The defendant appeared specially and objected to the jurisdiction of the court. The objection was overruled, and the defendant not making a further appearance, judgment was rendered against him for the sum of \$199 and costs. The judgment was rendered on the 14th of December, 1882. On the 22d of that month the defendant filed an undertaking for an appeal to the district court, which was duly approved. The defendant failed to perfect his appeal, and at the next term of the district court the plaintiff filed a transcript of the proceedings before the

Dean v. Kinman.

justice, and moved for an affirmance of the judgment. The motion was overruled and the appeal dismissed. A supplemental transcript of the justice was filed, from which it appears that after the undertaking for the appeal had been filed and approved the defendant appeared before the justice and moved to set aside the default; that he thereupon confessed judgment for costs and the default was set aside; that afterwards, as the plaintiff failed to appear and prosecute, the action was dismissed. So that the case is presented here on two records, one showing a judgment in favor of the plaintiff and an appeal therefrom, and the other showing that after the appeal was taken the judgment was set aside and the action dismissed. The question presented is this: After a party has appealed from a judgment against him, can the justice, while the appeal is pending and undetermined, set the judgment aside? We think not. If such a practice was permitted it would create interminable confusion. If a party desires the setting aside of a judgment he must file his motion for that purpose and have it acted upon before filing an undertaking for an appeal. If it is objected that the defendant had not contested the case before the justice and therefore could not appeal, it is a sufficient answer to say that the right to insist upon the objection is a personal privilege that may be waived and will be unless objection is made on that ground. *Goodrich v. Omaha*, 11 Neb, 204. The court has jurisdiction of the subject matter, and by a general appearance the parties conferred jurisdiction over themselves. The plaintiff in this case by filing the transcript in the district court waived the objection named and conferred jurisdiction on that court. The judgment of the district court is reversed and the cause is remanded with leave to both parties to file pleadings and try the cause on the merits.

JUDGMENT ACCORDINGLY.

THE other judges concur.

PHOENIX INSURANCE CO., PLAINTIFF IN ERROR, V. JAMES
LANSING, DEFENDANT IN ERROR.

Insurance: ACCEPTANCE OF PREMIUM: WAIVER: A policy of insurance was made Sept. 4th, 1879, to run five years, and a note taken for the premium due May 1st, 1880. The policy contained a provision that if the note was not paid when due, the policy should be void. In October, 1880, a loss occurred. The premium note was paid in April, 1881. *Held*, 1, That the acceptance of the premium was a waiver of forfeiture of the policy, and that the company was liable for the loss. 2, That the policy was voidable only, not void.

ERROR to the district court for Lancaster county. Tried below before POUND J.

J. R. Webster, for plaintiff in error.

The policy contained the following provisions: "If
* * * the premium note shall be due and unpaid
* * * In every such case this policy is void. In
case the assured shall fail or refuse to pay the premium
note above described when due [May 3, 1880], this policy
shall then and thenceforward be and remain null and void,
and same cannot be revived without the written consent of
the company, but this shall not prevent this company col-
lecting by suit or otherwise the premium note above de-
scribed. Nor shall such attempt, or suit to collect said
premium note, be construed to revive this policy, but same
shall be and remain null and void during such default and
until the said assured shall pay said premium note, interest,
fees, and costs, and until this company shall receive the
same, and return said premium note to said assured, and
in such case his policy shall be revived only for the period
originally stated herein, subject to the terms and conditions
of this policy.

"Whenever this policy may have become void from any
cause, it shall not be revived or reinstated by the renewal

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certificate or receipt, or in any other way except by a special contract for such reinstating in writing thereon, or by the issuing of a new policy.

"It is furthermore hereby expressly provided that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustained in any court of law or chancery * * * Unless such suit or action shall be commenced within six months next after the loss shall occur; and should any suit or action be commenced against this company after the expiration of the aforesaid six months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute to the contrary notwithstanding.

"The use of general terms, or anything less than a distinct specific agreement clearly expressed and endorsed on this policy *shall not be construed as a waiver* of any printed or written condition or restriction herein."

Payment of note due May 1, 1880, was defaulted. Loss occurred October 6, 1880. Note paid April 4, 1881. No proof of loss sent in until July 21, 1881. Suit commenced November 3, 1881. There is no liability against the company. *Walsh v. Aetna Insurance Company*, 30 Iowa, 133. *Dennison v. Phoenix Insurance Co.*, 52 Iowa, 457-459. *Newton v. Fire Insurance Company*, 15 Wis., 138. *Harrison v. Insurance Company*, 9 Allen, 231. *Diehl v. Insurance Company*, 58 Penn. St., 443.

Charles E. Magoon, for defendant in error.

Conditions of policy were waived by insurer. Waiver may be implied from acts and conduct. *Wood Fire Insurance*, § 496. *Greenfield v. Mass. Ins. Co.*, 47 N. Y., 430. *Pitney v. Glens Falls Ins. Co.*, 61 Barb., 335. *Planters' Ins. Co. v. Comfort*, 50 Miss., 662. *Smith v. Glen's Falls Ins. Co.*, 62 N. Y., 85. *Cobb v. Ins. Co.*, 11 Kan., 93. *Ins. Co. v. Fay*, 22 Mich., 467. *Globe Ins. Co.*

v. Boyle, 21 Ohio St., 119. That the insurance company elected to consider the policy in force is shown by their constant endeavor to collect the amount of the note, and their acceptance of the money when tendered, although the loss had occurred, and that fact was well known to the company. They having elected to consider the policy in force they cannot now be heard to declare it void. *Viele v. Germania Ins. Co.*, 26 Iowa, 55. *Miner v. Phoenix Ins. Co.*, 27 Wis., 693. *Liddle v. Market Ins. Co.*, 29 N. Y., 184. *Boehen v. Williamsburg Ins. Co.*, 35 N. Y., 131. *Lycoming Ins. Co. v. Stockbower*, 26 Penn. St., 199. *Wing v. Harvey*, 27 Eng. L. & E., 140.

MAXWELL, J.

This action was brought by Lansing against the insurance company to recover for the loss of property owned by him, which was insured by said company. It is alleged in the petition that the loss occurred on the 6th of October, 1880. The company in its answer admits making the policy of insurance upon the property in question, but alleges that at the time of making the policy said Lansing as the sole consideration therefor gave the company his promissory note for the sum of \$9.80, due on the 1st day of May, 1880, with interest at ten per cent; that he did not pay said note when it became due, nor until the 4th day of April, 1881; that said policy of insurance contained a provision that if the party insured "failed to pay said note on or before the same became due said contract and policy of insurance should thereby be and become void." The cause was submitted to the court without the intervention of a jury, and judgment rendered in favor of Lansing. A motion for a new trial having been overruled the company bring the cause into this court by petition in error.

The errors assigned are: 1. Errors in the assessment

of damages. 2. That the findings are not supported by sufficient evidence. 3. Errors of law occurring at the trial.

Nothing is claimed in the brief under the 1st and 3d assignments, and they need not be considered. The policy is dated September 4, 1879, to continue in force for five years—expiring September 4, 1884. It is claimed—and this is the principal error relied on—that the note not being paid according to its terms the policy immediately became void; and the loss occurring while Lansing was thus in default of payment that the company is not liable. The note was afterwards paid, the money due thereon being accepted by the company. The company did not surrender the note when it became due, but retained the same and afterwards collected it. This was the consideration for the insurance. Now if the company receives and retains the premium can it as a defense to an action on the policy to recover for loss of the property insured allege a failure to pay promptly at the day? The acceptance of the money is a waiver of any default in that respect. The policy was not void but voidable; and upon the failure of Lansing to pay the note when it became due, the company could have returned the note and demanded a surrender of the policy. But it cannot treat the policy as valid to collect the premium, and void for the payment of losses. The note having been paid after the loss the acceptance of the money waived the condition of forfeiture in the policy, and it was valid and subsisting at the time of the loss. It is objected that the action was not brought within six months after the loss occurred, as provided in the conditions of the policy. It is unnecessary to determine whether or not such a condition will bar an action after the time limited, as the proof clearly shows a waiver of the condition. Justice appears to have been done, and there is no error in the record. The judgment must therefore be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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EDWARD THOMPSON ET AL., APPELLEES, V. SELDEN N.
MERRIAM, APPELLANT.

1. **Tax Deed.** Under the revenue law of 1869 a tax deed that fails to recite the place where the land was sold is invalid.
2. ———. The production of the tax certificate is a condition precedent to the right of the county treasurer to execute a tax deed, and he has no authority to issue a second deed upon a canceled certificate in the county clerk's office.

APPEAL from Cass county. Heard below before POUND, J.

Covell & Ransom, for appellant.

Treasurer had authority to make second tax deed. *McCready v. Sexton*, 29 Iowa, 356. *Hurley v. Street*, Id., 429. *Lorrain v. Smith*, 37 Id., 67.

Robert B. Windham and *Orites & Ramsey*, for appellees.

MAXWELL, J.

This is an action to cancel certain tax deeds held by the defendant upon real estate of the plaintiffs, and to permit them to redeem from the tax sales. A decree was rendered in the court below setting aside the tax deeds and requiring the plaintiff to pay, for the use of the defendant, the amounts paid by him on the lands in controversy with twelve per cent interest thereon. The defendant appeals to this court.

It appears from the record that in 1874 the lands in question were sold to the defendant for the taxes due thereon for the year 1873, and a certificate of purchase given to him. Two years thereafter, to-wit, on the seventh day of September, 1876, the defendant produced the certificate to the treasurer of the county and received a tax deed for the

lands described therein. The certificate was then canceled, as required by the statute then in force, and filed with the county clerk. The tax deed above referred to, after reciting the production of the certificate, states: "From which it appears that S. N. Merriam did, on the seventh day of September, 1874, purchase at public sale in said county the tract," etc., thereafter described. It nowhere appears on the face of the deed that the land was sold at the door of the court house or the treasurer's office, as required by the statute, and this omission is fatal to the validity of the tax deed. *Haller v. Blaco*, 10 Neb., 36. *Howard v. Lamas-ter*, 11 Id., 582. *Towle v. Holt*, 14 Id., 227. The defendant, being aware of this defect, in 1878 procured from the then county treasurer a second tax deed for the same land. The recital in this deed is as follows: "Whereas, from personal examination by the undersigned, J. M. Patterson, treasurer of the county of Cass, in the state of Nebraska, a certificate of purchase in writing bearing date the seventh day of September, 1874, signed by J. C. Cummins, who at the last mentioned date was treasurer of said county, is found to be on file in the office of the clerk of the aforesaid county, from which it appears that S. N. Merriam did, on the seventh day of September, 1874, purchase at public auction at the door of the court house," etc., the lands thereafter designated. It will be seen that the certificate upon which the last deed was issued was not produced to the county treasurer, as required by the statute. *Reed v. Merriam*, ante page 323. In the case last cited it is said: "Unless the certificate was presented to the county treasurer he had no authority whatever to execute a deed. This was a condition precedent to his right to exercise that authority. In other words, the law makes the return of the certificate the evidence upon which the treasurer has authority to act." If a treasurer can execute a second deed after the cancellation of the certificate, there would be nothing to prevent his issuing a thousand or any other number

Lydick v. Korner.

without notice and in utter disregard of the rights of the land owner. But this he cannot do. If the tax title fails our statute has provided a remedy—the foreclosure of the tax lien, and he must resort to this. But if the land owner institutes an action to cancel the tax deeds he must offer to do equity by paying or tendering the taxes due with interest thereon. This the plaintiffs have done. The tax deeds being invalid, the decree canceling the same as a cloud on the plaintiffs' title was not erroneous. The judgment of the district court is right and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

DANIEL LYDICK, PLAINTIFF IN ERROR, V. LEVI KORNER,
DEFENDANT IN ERROR.

1. **Liquor Selling: CANCELLATION OF LICENSE: TREASURER NOT LIABLE.** Where a remonstrance against issuing a license to sell liquor was overruled by a city council, the amount required for the license paid to the city treasurer, and no appeal having been taken within a reasonable time, and license issued, *Held*, That the subsequent cancellation of the license by the district court, the money having been paid into the treasury, did not render the treasurer liable for the repayment of the money.
2. ——— : ———. **REFUNDING LICENSE MONEY.** Where a license is canceled the court should direct repayment *pro tanto* of the amount paid for the same for the unexpired time.

ERROR to the district court for Richardson county.
Tried below before DAVIDSON, J.

Martin & Gilman, for plaintiff in error, cited: *State, ex rel. Johnson, v. Cornwell*, 12 Neb., 470. *Horn v. State*, 1 Ohio State, 121. *State, ex rel. Noonan, v. Lincoln*, 6 Neb., 15.

15	500
143	293
15	500
47	822
15	500
51	859
15	500
58	152

Amos E. Gantt and *C. Gillespie*, for defendant in error, cited: *Lydick v. Korner*, 13 Neb., 10. *Pundt v. Clary*, 18 Neb., 406. *Pleuler v. The State*, 11 Neb., 577. *VanBuren v. Downing*, 41 Wis., 122. *Emery v. Lowell*, 127 Mass., 138. *Herman v. Edson*, 9 Neb., 157.

MAXWELL, J.

The plaintiff obtained a license from the proper authorities of Falls City in October, 1881, to sell intoxicating liquors in that city, during the then fiscal year. A remonstrance had been filed against the granting of license, which was overruled, and after a delay of ten or twelve days, no appeal having been taken, the license was issued. At the next term of the district court, however, held in December thereafter, a transcript was filed in the district court, the remonstrance sustained, and the license canceled. The case was brought into this court on error, and the judgment of the district court reversed. *Lydick v. Korner*, 13 Neb., 10.

Upon the cancellation of his license the plaintiff closed his saloon, and brought this action against the defendant, who at that time was city treasurer, to recover the money paid for the license. The court below found for the defendant, and dismissed the action. It is unnecessary to review the assignments of error at length, as there can be no recovery against the defendant. He merely performed his duty, and paid the money into the city treasury, and had done so before the action was brought, therefore he is not liable. It is evident, however, that the plaintiff has sustained a wrong. He was entitled either to a license or a return of the money paid for the same, at least *pro tanto* for the unexpired time upon the cancellation of the license, and the court should have directed its repayment. This is but justice. *The State v. Cornwell*, 12 Neb., 470.

But no relief can be given in this action. The judgment must therefore be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

15	502
20	227
15	502
31	111
15	502
34	226
15	502
38	800

WILLARD STEWART, PLAINTIFF IN ERROR, v. W. H. SNELLING, DEFENDANT IN ERROR.

1. **Partnership: REAL PROPERTY: TITLE.** A firm having purchased real estate at guardian sale, and obtained a deed for the widow's right of dower therein, one of the partners thereupon agreed with the other to pay him \$803 in excess of the purchase price for his half interest in the property if the title to the same did not entirely fail. The party purchasing thereupon entered into an agreement with the guardian to have a decree entered setting the guardian's sale aside, and to pay an increased price for the property, but still retained the dower interest. *Held*, That as he retained the dower interest the title had not entirely failed.
2. ———: ———. *Quære*: Whether the plaintiff could avail himself of a failure of title procured by his consent?

ERROR to the district court for Lancaster county. Tried below before POUND, J.

J. R. Webster, for plaintiff in error.

Walter J. Lamb, for defendant in error.

MAXWELL, J.

This is an action for an accounting between partners. It appears from the record that in the year 1878 the plaintiff and defendant entered into partnership in the law and

real estate business, the plaintiff being a real estate agent and the defendant an attorney. The partnership was dissolved in 1881. On the trial of the cause the court found there was due the defendant the sum of \$803.56, and rendered judgment in his favor for that amount. The only error complained of is an item for \$400, with interest from September 1st, 1881, which, it is claimed, was improperly allowed the defendant. The testimony shows that in the year 1880, the plaintiff and defendant entered into a contract with one Daggy, guardian of the minor heirs of A. D. Wood, to give not less than \$2,500, with costs and expenses, for certain real estate belonging to said heirs, provided said guardian would institute legal proceedings and cause the same to be sold. A deed for said real estate was thereupon made by Elizabeth D. Wood, the widow of A. D. Wood, conveying her right of dower therein to the defendant. A guardian sale of the property was thereupon had, and the property purchased by Stewart for the firm, and the deed taken in his name. After this proceeding the parties entered into the following agreement:

"This agreement, made this 21st day of April, 1881, between W. E. Stewart and W. H. Snelling. It is agreed that W. E. Stewart pay W. H. Snelling eight hundred dollars for his interest in the A. D. Wood property on corner of N and Eleventh streets, in Lincoln, paid as follows: Three hundred dollars cash in hand, and to credit Snelling's account for one hundred dollars, and balance of four hundred dollars to be paid on the first of September next, or before if said Stewart makes sale of said property. And in the event the title should fail to said property *entirely*, then the said four hundred dollars shall not be paid, and he shall be liable therefor in case James Daggy, guardian, refuses to assist in perfecting the title to the same, or in case the same is not perfected by the supreme court of Nebraska, then Stewart shall not be liable for any amount, provided, that in case title is perfected and sale is not made

Stewart v. Snelling.

within eighteen months from date, then the four hundred dollars shall be due and payable with ten per cent interest after September 1st, 1881.

"In witness whereof the parties hereto have this day set their hands and seals, the day and year first inserted.

"WILLARD E. STEWART, [s.]

"W. H. SNELLING. [s.]

"Witness:

"WALES FRANK SEVERANCE."

Afterwards an action was brought by the guardian to set the sale aside, and in March, 1882, the plaintiff entered into an agreement with the guardian to pay an additional sum of \$550 and all costs of quieting his title to said property, and further agreed that in the suit then pending a decree be entered quieting title in said minors subject to the estate in dower with lien to said Stewart for his just and equitable charges, \$3,438.33. It was also agreed that there should be a re-sale of the property by the guardian, and giving the plaintiff certain privileges pending the sale. A decree was entered in conformity to the agreement, and on a re-sale of the property by the guardian, the plaintiff purchased the same at the price agreed upon, and now claims that the title under the agreement with Snelling failed, and therefore he is not liable thereon. It will be observed that the provisions of the agreement between the plaintiff and defendant are that if the title fails *entirely*, then the plaintiff was not to be liable.

All the testimony shows there was not an entire failure of title. The defendant was still possessed of the dower interest conveyed to him by Mrs. Wood, which, so far as this record discloses, may have been and probably was worth very much more than the amount paid and agreed to be paid by the plaintiff. This being so, the plaintiff is liable on the contract. It may well be doubted whether he was entirely disinterested in the agreement

Vifquain v. Finch.

made by him to set aside the first guardian's deed, or whether the defendant would be bound by a decree obtained in that way. But it is unnecessary to determine that question, as the plaintiff still retained an interest the property, which it is pretty clear was used to advantage in preventing competition in the sale of the interest of the minors in the property. The plaintiff has no cause of complaint, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

19-705

VICTOR VIFQUAIN ET AL., PLAINTIFFS IN ERROR, v. JOHN
B. FINCH, DEFENDANT IN ERROR.

1. **Libel: PRACTICE: ARGUMENT OF COUNSEL:** In an action for libel where the defendant justifies and pleads the truth of the charge and that the publication was founded upon rumor and was without malice, *Held*, That the question of malice being in issue the plaintiff was entitled to open and close.
2. ——— : **EVIDENCE.** In an action for the publication of an alleged libel in a designated newspaper, the republication of the same matter in other papers is not admissible in evidence.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Marquett, Deweese & Hall, for plaintiffs in error.

We had the right to open and close. Maxwell Pl. and Pr., 381. *Lexington v. Paver*, 16 Ohio, 330. *Heilman v. Shanklin*, 60 Ind., 443. *Tull v. David*, 27 Ind., 377. Republication in other papers. *Hastings v. Stetson*, 126 Mass., 329. *Gough v. Goldsmith*, 44 Wis., 262. Instruc-

15	505
17	423
22	655
15	505
30	141
30	436
15	505
36	374
15	505
47	184
15	505
53	715
15	505
56	383

tion to jury. Sackett, 16. *Kendall v. Brown*, 74 Ill., 232. *Camp v. Phillips*, 42 Georgia, 289.

O. P. Mason, for defendant in error, cited: *Shaw v. Barnhart*, 17 Ind., 185. *Jackson v. Pittford*, 8 Blackf., 194. *Page v. Osgood*, 2 Gray, 260. *Barrett v. Long*, 3 H. L. Cases, 395. *Townsend on Libel*, § 390. *Parmer v. Anderson*, 33 Ala., 78. *Fry v. Bennett*, 28 N. Y., 328. 1 Smith Leading Cases, 132.

MAXWELL, J.

On the fourth day of May, 1880, the plaintiffs in error owned and published the *Daily State Democrat* of Lincoln, in this state, and on that day published in said paper an alleged libel against the defendant, the principal portion of which is the following: "Some time last winter a young girl came to this city from another part of the state for the purpose of attending the university course. Being poor and unable to pay for board, she engaged work in the family of John B. Finch, doing housework morning and evenings and attending the school during the day. She was young and pretty and modest, and any man with a spark of manhood about him would naturally suppose that she would have been safe from insult and lascivious approaches. But it was not the case it seems. The lecherous nature of this man Finch, who was in a measure her protector, could not leave her in peace. Almost from the first hour of her stoppage in his house he began a systematic attempt to induce her to gratify his unholy and shameful desires. By words and deeds and actions he followed up the poor girl, until one evening his conduct became so unbearable that she left the house and went to a neighboring boarding house," etc. There were other charges to which it is unnecessary to refer. The defendant in error brought this action against the plaintiffs to recover the sum of ten thousand dollars for the alleged libel, the alleged libelous mat-

Vifquain v. Finch.

ter being set out at length in the petition. The plaintiffs in error (defendants below) in their answer admit that they were the owners and publishers of the *Daily Democrat* on the fourth day of May, 1880; admit the publication of the alleged libelous words set out in the petition, and allege that said words are true, and that he was "guilty of all that was charged against him in said publication." They also plead in justification public rumor and a want of malice. On the trial of the cause a verdict was rendered in favor of Finch for the sum of \$500, upon which judgment was rendered.

The first error assigned in this court is, that the defendants below having admitted the publication of the alleged libel and claimed that the words so published were true, that therefore they were entitled to open and close the case.

Sec. 283 of the code provides that, the party who would be defeated if no evidence was given on either side must first produce his evidence. In other words, the party holding the affirmative of the issue is entitled to open and close. If, however, anything remains to be proven affirmatively by the plaintiff he is entitled to open and close. *Lexington Ins. Co. v. Paver*, 16 Ohio, 324. In the fourth paragraph of the answer we find a plea of general rumor as to the matter published, and that the publication was without malice. The answer in this regard must be construed together, and the question of malice was put in issue by the pleadings, and entitled the plaintiff below to open and close.

2. Error in admitting evidence of the publication of the alleged libelous matter in other papers than the *Democrat*. On his direct examination the plaintiff below testified that the article in question was republished at Lincoln, Illinois, and other places. This was objected to, and the objection overruled. The action is brought for the publication of the alleged libelous article in the *Democrat* of Lincoln, and not in other papers, and the evidence should have been confined to that paper. Besides, the evidence is

too remote, as the publishers of the *Democrat*, under the facts as shown in this case at least, were not liable in damages for what may have been published in papers over which they had no control. The court therefore erred in admitting the evidence.

The defendants below asked the following instruction, which was refused and an exception taken: "The holding back of evidence may be used as a presumption of fact against the party who holds it back or puts it out of reach. And if the jury believe from the evidence that Ellen Morehouse, the girl referred to in the article that was published by the defendants, was sent or caused to be sent away by the plaintiff or by plaintiff's friends, on his behalf and with his consent or by his direction, you may consider this fact in determining whether the plaintiff's conduct had been such as to justify the publication complained of."

There is testimony tending to show that a few days after Ellen Morehouse left Mr. Finch's residence, Mrs. Finch and a Mrs. White called at the residence of Mrs. Hoge, where Ellen was boarding, and had a conversation with her (Ellen) alone. Afterwards a number of other conferences seem to have been had; that Mrs. White at that time had her home at Mr. Finch's; that another lady, a friend of Mr. Finch, raised money and purchased a ticket for Ellen to New Brunswick; that the girl was sent away, the ticket being given to her with money to pay her expenses. This was about two weeks after the publication complained of. That the girl was sent away without that fact being generally known, the instructions to the person who took her to Omaha being, "to buy her a lunch, and keep her veiled, and see that she left Omaha." There is no testimony in the record tending to show to what particular place the girl was sent. Mr. Finch, in his testimony, denies that the girl was sent away at his instance or request or with his knowledge, and if the question rested on his testimony alone, the request was properly refused. But

 Levi v. Latham.

there are circumstances connected with the removal of the girl from which Mr. Finch's assent, at least, may be inferred, and such circumstances must be submitted to the jury. She certainly is a material witness in the case to establish the truth or falsity of the charge. It is somewhat remarkable that no one concerned in the matter seems to know to what place she was sent. As there must be a new trial and the question submitted to the jury, we will not further discuss the evidence. The instruction asked should have been given. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

COBB, CH. J., and REESE, J., concur in the points stated in the syllabus.

15	506
44	119
15	509
48	429

LEOPOLD LEVI, PLAINTIFF IN ERROR, V. DIANTHA
LATHAM, DEFENDANT IN ERROR.

1. **Partnership—nontrading: NOTE: AUTHORITY OF ONE MEMBER TO MAKE.** One partner in a non-trading partnership cannot bind his co-partner by a promissory note made by him in the firm name unless he has express authority therefor, or the giving of such note is necessary to the carrying on of the business or is usual in similar partnerships.
2. **—: —: BURDEN OF PROOF.** In such case, the burden is upon the party suing on the note to prove such authority, necessity, or usage; and the fact that such partnership, by the express consent and approval of each of the members, had on one occasion borrowed money from the payee of the note will not be held to give such authority, especially when the note is given for money borrowed by the member of the firm executing it for his own use and not for the firm.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Watson & Wodehouse (O. P. Mason and R. D. Stearns with them), for plaintiff in error, cited: *Elliott v. Dudley*, 19 Barb., 326. *Spuck v. Leonard*, 9 Brad., 174. *Mercein v. Mack*, 10 Wend., 461. *Smith v. Sloan*, 37 Wis., 285. *Kimbrow v. Bullitt*, 22 How., 256.

L. C. Burr, for defendant in error, cited: *Parsons Part.*, 61. *Smith v. Knight*, 71 Ill., 148. *Peck v. Lust*, 38 Iowa, 93.

REESE, J.

This action is upon a promissory note executed in the firm name of Monroe & Levi. The plaintiff in error and one Horace Monroe were engaged in the business of keeping a livery stable under the firm name of Monroe & Levi. During the existence of the partnership, Monroe borrowed of the defendant in error the sum of two hundred dollars, and executed to her a promissory note of the firm for that amount due in ninety days. This money was borrowed by Monroe for his own individual use, without the knowledge or consent of Levi, and none of it was used by the firm or went into the assets of the partnership.

We think the law is well settled that one member of a non-trading partnership has no authority to bind his co-partner by a note made by him in the firm name without express authority therefor from his co-partner, or where the giving of such instrument is necessary to the carrying on of the partnership business, or is usual in similar partnerships; and the burden is upon the party suing on a note given by one member of such firm to prove such authority, necessity, or usage. *Smith v. Sloan*, 37 Wis., 285. *Kimbrow v. Bullitt*, 22 How., 256. *Zuel v. Bowen*, 78 Ill.,

234. *Greenslade v. Dower*, 7 B. & C., 635. *Ulery v. Ginrich*, 57 Ills., 531. *Hunt v. Chapin*, 6 Lans. (N. Y.), 139.

The testimony introduced on the trial of the cause in the district court does not disclose any such authority, necessity, or usage, and there is nothing in the record which will sustain a conclusion that either existed. It is true there was proof that the firm at one time and prior to the giving of the note set out in the petition of the defendant in error, borrowed of the defendant in error the sum of five hundred dollars, but this transaction was made by both members of the firm acting together, both being present at the time the note was given and the money received, and from this transaction we fail to see wherein any conclusion can be drawn that any authority was given, either express or implied, to one member of the partnership to bind the firm by the execution of the note declared on.

From the testimony introduced on the trial, we are satisfied that the firm of Monroe & Levi was a non-trading partnership.

On the trial the court instructed the jury as follows: "If the jury finds from the testimony that the firm of Monroe & Levi had, before the giving of the note sued on, and but a short time prior thereto, borrowed money from the plaintiff, you are instructed that the borrowing of such money was holding out to the plaintiff that she might loan to the firm, at the request of either, other sums until she was notified by the firm or either member thereof that the firm had ceased to borrow money for its use." To the giving of this instruction the plaintiff in error excepted.

The plaintiff in error asked the court to give to the jury the two following instructions:

"2d. The jury are further instructed that where a note is given in the name of the firm by one partner in payment of his own individual debt, the law raises a presumption that it was done without the knowledge or consent of the

Ex parte Johnson.

other partner, and the burden of proving said knowledge and consent is upon the party alleging it."

"4th. The jury are further instructed that, if you find from the evidence that Monroe gave the note in controversy in the name of the firm of Monroe & Levi for money borrowed by him (Monroe) without the consent of Levi, then you will find for the defendant Levi."

The court refused to give these instructions, to which the plaintiff in error excepted.

In giving the first instruction above quoted, and in refusing to give the two last, we think the court erred. The first being in conflict with the law applicable to such partnerships as hereinbefore stated, and the two last being in harmony with that rule.

The judgment of the district court is reversed, and a new trial ordered.

REVERSED AND REMANDED.

THE other judges concur.

15	512
30	847

15	512
30	663

EX PARTE HIBBERT JOHNSON.

1. **Officer De Facto: ACTS VALID.** The acts of an officer *de facto* are not void.
2. **Office: RIGHT TO HOLD.** The right of an incumbent to hold an office will not be enquired into collaterally. Such can only be done by a direct proceeding instituted for that purpose.
3. **Habeas Corpus: IMPRISONMENT MUST BE UNLAWFUL.** Where a person has been duly convicted of a misdemeanor and ordered to pay a fine, or in default thereof be committed to the jail of the county until such fine and the costs are paid, he cannot be discharged upon a writ of *habeas corpus* without first complying with the judgment of the court.

REESE, J.

This is an original application for a writ of *habeas corpus*.

There are two questions presented upon which the writ is sought.

1st. It is claimed that the justice of the peace before whom the petitioner was tried and convicted upon a criminal complaint was not in fact such officer; but he claimed, held, and usurped said office without authority of law.

It clearly appears from the petition and copies of the docket entries attached, that the justice claims to hold and exercise the functions of his office by right.

It is well settled that the acts of an officer *de facto* are valid, and it as clearly appears that the justice before whom the petitioner was tried and convicted was, at least, an officer *de facto*.

Again, the title to an office, by which one holds and exercises the functions of such office, cannot be litigated in this collateral way. It can only be done by a direct proceeding instituted for that purpose.

2d. It is contended by the applicant that the mittimus by which he is held is void, it being a command to detain him until the next term of the district court, when it should have been until the fine and costs assessed against him were paid. By reference to the docket entry of the justice, we find the following recital: "Said defendant refused to pay the above fine and costs. I therefore issued mittimus committing him to the common jail of said county until said fine and costs be paid, or he be otherwise discharged by due course of law." The fine and costs have not been paid. The writ is therefore denied. By the court,

WRIT DENIED.

Hastings & McGintie, for the petitioner.

15	514
d54	377

ALSON PARODY, APPELLANT, v. SCHOOL DISTRICT NO. ELEVEN OF CUMING COUNTY, DAVID BRIGHT, T. G. WADSWORTH, JOHN LANDIS, AND JASPER RANDOLPH, APPELLEES.

1. **Injunction: PETITION.** A petition which seeks to enjoin a public officer or a public corporation from controlling public property in accordance with the lawfully expressed direction of the corporation, must show that the plaintiff will sustain some special damage not common to the public, or the petition will not state facts sufficient to entitle him to the relief sought.
2. **Error Must Affirmatively Appear.** Error must affirmatively appear of record to justify the reversal of a judgment.

APPEAL from Cuming county. Heard below before BARNES, J.

R. F. Stevenson and M. McLaughlin, for appellant.

C. C. McNish, for appellees.

REESE, J.

The plaintiff filed his petition in the district court of Cuming county, alleging that the defendants were about to remove the school house of the district in which he resided from its former site to another, that the contemplated removal was unlawful, and asking an injunction to restrain them from so doing. A temporary injunction was issued by the county judge of Cuming county, which was afterwards vacated by the judge of the district court. The issues were joined at the September term, 1881, and the trial commenced, but when the testimony of the plaintiff and one witness, the county superintendent of schools, had been heard, the court dismissed the action without hearing further testimony. The plaintiff excepted and obtained forty days in which to prepare a bill of exceptions. A transcript

of the record and the bill of exceptions are filed in this court, but no petition in error, assignment of errors, or brief, and we are left wholly in the dark as to the questions presented to the district court.

The petition, we think, fails to state a cause of action. It is well settled that in matters affecting the public, the plaintiff must show by his petition that he will suffer some special damage not common to the public or he cannot maintain an action of this kind. There is no intimation that the plaintiff will suffer any damage whatever by the proposed change. He does not state whether the school house will be located nearer to him or farther off, whether it will be less or more convenient.

The proceedings of the annual district meeting at which the house was ordered removed to another site appear to be regular. Error must affirmatively appear of record to justify this court in reversing a judgment. *Hamilton County v. Bailey*, 12 Neb., 61. Our attention has been called to none in this case. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

MARTIN L. COOPER, PLAINTIFF IN ERROR, V. FAYETTE
I. FOSS, DEFENDANT IN ERROR.

1. **Judicial Sale: CONFIRMATION.** On proceedings to affirm a sale of mortgaged premises, no objection will be heard founded on an erroneous or imperfect description of the premises in any of the proceedings, unless it be alleged and shown that the party objecting will be prejudiced thereby; nor in cases of personal service or appearance of such party in the action, and such erroneous or imperfect description occurs in proceedings before judgment.

15	515
20	227
15	515
27	839
15	515
31	111
31	131
15	515
34	226
15	515
38	800
39	186
15	515
40	699
15	515
44	221
15	515
45	92
15	515
52	402
53	476
54	569
15	515
57	290
15	515
58	804
15	515
59	683

15 515
61 398

2. ———: PURCHASE SUBJECT TO MORTGAGE. The purchaser of mortgaged premises, who, as the whole or part consideration for such purchase, agrees to pay off the mortgage, may be sued upon default of such payment by the holder of such mortgage; or, if he be made a party to a suit to foreclose such mortgage, a judgment may be rendered against him for a deficiency which may remain after applying the proceeds of a sale of the mortgaged premises to the extinguishment of the mortgage debt.

ERROR to the district court for Saline county. Heard below before MORRIS, J.

Hastings & McGintie, for plaintiff in error.

Misdescription. *Parrat v. Neligh*, 7 Neb., 458. Deficiency judgment. 2 Wash. Real Prop., 571. *Marsh v. Pike*, 1 Sand. Ch., 210. *Carpenter v. Koons*, 20 Penn. State, 222.

Dawes & Foss, for defendant in error.

Misdescription. *Ohio Life Ins. Co. v. Goodin*, 10 Ohio State, 557. *McCreary v. Pratt*, 9 Neb., 122. Deficiency judgment. Code, § 849. 2 Washburn, 571. 1 Jones on Mortgages, § 478. *Curtis v. Tyler*, 9 Paige, 435. 4 Wait's Actions and Defenses, 579. *Fenton v. Lord*, 128 Mass., 466.

COBB, CH. J.

It appears from the record in this case, that on the 1st day of January, 1880, one James C. Chowins and Julia Chowins, his wife, made their mortgage deed to the defendant in error to secure the payment of some \$2,500 and more, then owing to him by the said James Chowins, to and upon certain real estate described in said mortgage as follows: "All the following described real estate, situated in De Witt precinct, in Saline county, and State of Nebraska, to-wit: The undivided one-half of three acres of land lying in a square form in the south-east quarter of section

15, township 5, of range 4, east of the 6th p. m., more particularly known as the Swan City mill property."

It further appears, that on the 25th day of February, 1882, the defendant in error commenced his action in the district court of Saline county for the foreclosure of the said mortgage; in which action, James C. Chowins, Martin L. Cooper, and Mary L. Cooper were made defendants; the petition alleging that the said Martin L. Cooper and Mary L. Cooper had or claimed to have some interest in and to the said premises by reason of a certain deed of conveyance from the said James Chowins, together with the allegation that the same, whatsoever it might be, was inferior and subject to the lien of the said mortgage, and that in the conveyance from James Chowins and wife to Martin L. Cooper, said Martin L. Cooper assumed the payment of said notes and mortgage.

The said James C. Chowins waived the issuance of the summons in said action, and entered his personal appearance therein in writing; and summons was issued against the said Martin L. Cooper and Mary L. Cooper, and was personally served. No answer or defense was made, and the cause was tried to the court without the intervention of a jury, who found that there was due the plaintiff the sum of \$2,891.52, and a general judgment of foreclosure and sale was entered thereon. It also appeared, that on the 20th day of April, 1882, the said Martin L. Cooper and Mary L. Cooper filed in said court their request in writing for a stay of the order of sale in the said cause. Upon the expiration of said stay, to-wit, on the sixth day of January, 1883, an order of sale was duly issued to the sheriff of said county; that said sheriff, on the tenth day of March following, filed his report in said cause showing the appraisement and sale of said premises, and that after applying all of the moneys arising from said sale properly applicable thereto there remained a deficiency of \$1,597.90 due to the plaintiff therein.

In said order of sale, as well as the return of the sheriff, the property is described as the undivided one-half of three acres of land lying in a square form in the south-east quarter of the south-west quarter of section 15, in township 5 n., of range 4 e. of the 6th principal meridian, known as the Swan City mill property.

It also appears that on the thirteenth day of March, 1883, the said Martin L. Cooper and Mary L. Cooper filed their exceptions to the report of said sheriff and to the confirmation of the said sale; and that upon the hearing of said exceptions and of the motion of the plaintiff to confirm the said sale, the said court ordered and entered of record that, after careful examination of all the proceedings had and done in said matter, and being satisfied that the sale had been made in all respects in conformity to law and the orders of this court, it was ordered that the proceedings in the same be and the same were thereby approved and confirmed; that the sheriff conveyed to the purchaser, Fayette I. Foss, he being plaintiff in the case, by deed in fee simple, the land and tenements so sold, to-wit: The undivided one-half of three acres of land, lying in a square form, of the south-east quarter of the south-west quarter of section 15, town 5 north, of range 4 e. of the 6th p. m., known as the Swan City mill property, together with all and singular the hereditaments and appurtenances thereto belonging, erroneously described in the pleadings as follows, to-wit: The undivided one-half of three acres of land lying in a square form in the south-east quarter of section 15, town 5, range 4 e. of the 6th p. m., more particularly known as the Swan City mill property.

"And the court coming now to distribute the proceeds of said sale, the sheriff is ordered, out of the proceeds of said sale, to pay to the clerk of this court the costs of this action; and there still remaining due to the plaintiff, the said F. I. Foss, the sum of \$1,523.32, it is considered and adjudged that said F. I. Foss have and recover of and from

the said James C. Chowins and Martin L. Cooper the said sum of \$1,523.32; and execution is hereby awarded therefor." The said Martin L. Cooper excepted to the said deficiency judgment as to him, and brings the cause to this court by petition in error.

The first and second points made by plaintiff in error in his brief are based upon the misdescription of the premises in the petition and decree, or, as he expresses it, "If a petition be filed describing a piece of real estate, a decree of foreclosure be rendered, on the premises described, an order of sale be issued for another and entirely different tract, and that different tract be sold, can the sale be upheld?" There was no doubt an error in the description in the petition and decree; but I do not consider it a fatal error. In each paper is cited as a more particular description that the premises are known as "The Swan City mill property;" and in each case the correct section, township, and range, as well as the county and precinct, are given. Certainly there can be no difficulty in identifying the property; nor was there any doubt, or uncertainty, as to what property was sold, as the error does not exist in any of the proceedings subsequent to the decree. It is not suggested that any of the parties have been misled by the error in the description, nor could it be. It is to the interest of a party liable for a deficiency, in a case of this kind, to have the proceedings correct, in every respect which can possibly affect the title to be acquired by the purchaser, to the end that the property may bring the best price; and where such party has appeared in such case and is not defaulted, he has the right in every stage of the proceedings to be heard for such purpose; but he can not stand by until the final order of confirmation is about to be made and then upset the whole proceeding by the interposition of an objection as to a mere matter of form. In such case the most that can be allowed to such defendant on the part of the court is, to hear an objection founded upon an actual loss or damage to his

rights. No such objection is made in this case. It is not even alleged that the sale which was about being confirmed was not made on a full and adequate bid or for the fair value of the property. Nor is it alleged that the error, pointed out in the exceptions, was not known to the defendant making them, as well before as after judgment.

The fourth point made by plaintiff in error in his brief is in the following words: "Taking for granted that the allegation in the petition, that Cooper assumed to Chowins to pay the mortgage debt, yet this was a matter entirely between Chowins and Cooper, with which defendant in error was not a party or privy, and being a stranger to the contract he cannot enforce it," etc. I understand the great weight of authority to be that, under statutes similar to ours, the holder of a note and mortgage, where a third person has bought the mortgaged premises, and as the whole or a part of the consideration therefor has agreed with the mortgagor to pay the mortgage debt, can sue such third person therefor with or without foreclosure, or upon foreclosure, if there is a deficiency, can take judgment against him therefor.

There being no prejudicial error in the record, the order of the district court is affirmed. By the court.

ORDER AFFIRMED.

GEORGE McMILLAN, CURTIS HULL, GIBSON KEITH, AND
CHRIS. KOCHLER, PLAINTIFFS IN ERROR, v. WIL-
LIAM S. ROWE, DEFENDANT IN ERROR.

1. **Execution:** LEVY BY ONE NOT AN OFFICER. When a private person, without authority or appointment from any source, assumes to act as a constable, and seizes the chattels of another, he becomes a trespasser; and it is no defense to him that he then

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and there had in his possession an execution against such person issued by a justice of the peace.

2. ———: ———. A sale by such unauthorized person of such chattels as upon execution conveys no title.
3. ———: ———: LIABILITY OF JUDGMENT CREDITOR. The plaintiff in such execution cannot be held responsible for the acts of such person in seizing or converting such chattels, unless he requested or authorized such seizure in fact, or in some way ratified the same.

ERROR to the district court for Adams county. Tried below before GASLIN, J.

Batty & Ragan, for plaintiffs in error, cited: *Freeman on Executions*, § 273. *Addison on Torts*, § 937. 4 *Blackstone*, 291. *Betts v. Stevens*, 6 Wis., 398.

O. B. Hewett, for defendant in error.

COBB, CH. J.

This was an action of trespass *de bonis asportatis* by William S. Rowe, plaintiff, against George McMillan, Curtis Hull, Gibson Keith, and Chris. Kochler, defendants.

It seems that Rowe, the plaintiff, was the owner of a quantity of barley; that McMillan and Hull had a judgment against said Rowe rendered by one Vandervoort, a justice of the peace; that the defendant, Gibson Keith, assuming to act as a constable, with the execution issued by said justice Vandervoort upon the said judgment in his hands, seized and took as upon execution the said barley of the defendant, advertised and sold it as upon said execution, and that the same was bought, taken, and converted to his own use by the defendant Chris Kochler. This was the cause of action stated in the petition. And substantially the same facts are set up in the several answers of the defendants, with the exception, that in the answer of the said Gibson Keith, he alleges that "at the request of

the said McMillan and Hull, and being satisfied that it was expedient so to do, the said justice did specially depute this defendant, then and there, being a discreet person of suitable age, and not interested in the said action of McMillan and Hull v. William S. Rowe, to serve said execution. Such deputation being then and there in writing on said execution; and said defendant accepted said appointment, and in virtue of said execution and in accordance with the command thereof, did levy upon and seize the following described goods and chattels, to-wit: One hundred and fifty-eight bushels and twenty-six pounds of barley," etc. Upon the trial to a jury, a verdict was found for the plaintiff and against all the defendants for the sum of one hundred eighteen dollars and ninety-eight cents (\$118.-98). The plaintiff before judgment remitted the sum of twenty-eight dollars and ninety-eight cents (\$28.98) of the sum so found, and a motion for a new trial was made and overruled, and judgment entered on the said verdict for the sum of ninety dollars (\$90). The case is brought to this court by petition in error.

The only points made by plaintiffs in error in their brief are: *First*, The judgment creditors, McMillan and Hull, are not responsible for anything done by Keith, even if he was a trespasser, as he acted without their request or knowledge. A thorough examination of the bill of exceptions fails to show that these defendants, McMillan and Hull, or either of them, or any attorney claiming to act for them, had anything whatever to do with the issuing of the execution, its service, or return, nor is there any evidence that they received the money made thereon. Had there been such evidence, as one member of the court, I should be of the opinion that such receipts would render them responsible for the acts of Keith in taking the barley upon this execution; but there being no such evidence, the verdict as to them is not sustained. The other point is, that the statute directing how a justice of the peace may appoint

a special constable is not the exclusive mode; the power existed at common law, and the issuing and delivery of the execution were sufficient. We cannot agree to this proposition. The authorities cited fail to sustain it. I do not think that there exists at common law any authority in a justice of the peace to appoint a constable to serve civil process. That such authority existed to appoint special constables to serve criminal process in certain cases is admitted. In this case there is no evidence of the appointment of Keith as constable to serve the execution either verbally or in writing; indeed, it would seem very clear from the testimony of Vandervoort, the justice who issued the execution, that he understood Keith to be a constable, and that no appointment was desired or necessary. The provision of the statute of this state on the subject of deputizing persons by justice of the peace to serve process is as follows:

“A justice, at the request of a party, and on being satisfied that it is expedient, may specially depute any discreet person of suitable age and not interested in the action to serve a summons or execution with or without an order to arrest the defendant or to attach property; such deputation must be in writing on the process.” Code, § 1094.

This statute is, in my opinion, exclusive of any other method of appointing persons to act as special constables in the service of civil process. Its provisions not having been followed, it is no protection to either Keith or Kochler—to the one in seizing and selling the barley in question, or to the other in buying it at the sale. The judgment of the district court as to the defendants McMillan and Hull is reversed, but without costs; and as to the defendants Keith and Kochler, the said judgment is affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

ADDISON H. JACKMAN, APPELLANT, V. THE MISSOURI
PACIFIC RAILROAD CO., APPELLEE.

Railroad: DAMAGES FOR RIGHT OF WAY. J. sold and deeded to the railroad company a right of way across his land. The railroad company constructed an embankment for the track of its road along and upon such right of way, and thereby diverted a running stream of water which crossed the right of way, and then, making a half circle, ran back, so that the embankment constituting the string of the bow left the bow on the west side of the embankment a pool of standing water. Thereupon, the railroad company instituted proceedings and condemned two small strips of J.'s land, one on each side of the said embankment—one on the east side for the purpose of a ditch to carry the water of said stream between the two points where the same was cut by the said embankment, and the other on the opposite side of the embankment for a "Y" track—both of said strips being connected along their whole length with the right of way sold and conveyed by said J. to the railroad company. Upon appeal from the assessment of damages for taking said strips of land, the rulings of the district court, as well in the excluding of testimony as in the giving and refusing of instructions, whereby J.'s damages were confined to the value of the land taken, *Upheld.*

APPEAL from Cass county. Tried below before POUND, J.

Crites & Ramsay, for appellant, cited: Sec. 86, chap. 16, Comp. Stat. *In re N. Y. Central*, 66 N. Y., 407. *Stodghill v. Chicago*, 43 Iowa, 26. *Mayor v. Thompson*, 29 Ark., 569. *Peoria R. R. v. Bryant*, 57 Ill., 473. *Mo. R. R. v. Haines*, 10 Kan., 439.

Everest & Wagoner, for appellee.

COBB, CH. J.

This is an appeal from the verdict and judgment in the district court of Cass county, on appeal from the award of commissioners appointed by the county court in condemnation proceedings made Sept. 14th, 1881, under sec. 97,

ch. 16 of the Compiled Statutes. The appellee acquired a right of way across appellant's land by deed, in June of that year. A perennial stream called Mill creek crossed said right of way from appellant's land on the east side running over and into appellant's land on the west side, flowing some twenty rods thereon, and meandering back across said right of way again into appellant's land on the east side, and from thence making its way into the Platte river. Appellant then was, and for a long time had been using said land for milling and stock feeding purposes, and making constant use of the waters of said stream. After the right of way was granted, the appellee constructed thereon an embankment twelve feet wide at the top, and eight feet high, filling up the channel of said stream at both points where it crossed the right of way, scooping the dirt for that purpose from the appellant's land east of and adjoining the right of way, entirely diverting the water of said stream from appellant's land west of the right of way into a channel formed by the removal of said dirt, which new channel was entirely on appellant's land east of the right of way by which diversion appellant lost all benefit, use, and enjoyment of the waters of said stream. After appellee's works were finished and the diversion of said stream complete, the appellee instituted these condemnation proceedings to procure the strip of land upon which the new channel of the stream rested, and also a three-cornered piece west of the tract on the alleged ground. The said parcels were necessary for right of way, switch, and side track purposes.

On the trial below, the district court held that damages accruing to the appellant under these circumstances by the diversion of the waters of said stream, were not proper to be included in the award of said commissioners, but must be recovered in a separate action, brought for that purpose, and so ruled, both during the introduction of evidence, and in instructing the jury.

On the trial, the court at the request of the plaintiff instructed the jury as follows:

1. The elements of damage for which you may allow in this case are: *First*, The fair market value of the land actually taken for railroad purposes; and, *Second*, The damages to the remainder of the tract not taken, accruing by reason of such taking. In no event can you render a verdict to the plaintiff for less than the actual and fair market value of the land actually taken.

6. It being conceded that the line and track of the Burlington & Missouri River Railroad Company in Nebraska skirts the tract of land in controversy on the south side thereof, you will not allow anything for benefits accruing to the tract in controversy, by reason of defendant's lines of railroad running through the same.

7. It being conceded that the defendant company had, previous to the taking of the lands appropriated, acquired right of way from the plaintiff for its main line and track through and over the premises in controversy, you cannot allow the defendant any benefits accruing to the plaintiff by reason of its lines being so located to off-set or reduce the damages accruing by reason of the subsequent appropriation of the lands in controversy.

Also the following, at the request of the defendant:

1. The court instructs the jury that in estimating plaintiff's damages they cannot consider or take into estimation any damage or injury caused by changing the channel of the stream, that plaintiff's remedy for any such injury is by a separate and distinct action, commenced and prosecuted for that purpose.

2. That this is an appeal from the award of commissioners appointed to appraise the value of said lands; that in estimating the damages you should find, first, the amount of land so taken, then its market value, and from this determine the value thereof in money, which would constitute plaintiff's damage with damage to the remaining land if any there be.

The following instructions were requested by the plaintiff and refused by the court.

2. In ascertaining the damages to the balance of the tracts not taken, you are first to ascertain its fair market value before the taking, and its fair market value after the taking of the same and the completion of the defendant's work thereon. Deduct this latter sum from the first one mentioned in this instruction, and you will have the amount of damage accruing to the remainder of the tract not taken. This sum, added to the value of the land taken, with seven per cent interest thereon from the time of taking, will be the amount for which you should return verdict in favor of the plaintiff.

3. In determining the damages to the land not taken, you will assess them with reference to the injury done to the plaintiff by such taking; the injury to the business which he had pursued thereon, as well as the uses in his business to which a man engaged thereon might reasonably put the premises; not with reference to any particular time in the future, but to such use as is customary, ordinary, and usual to use premises in the business in which the plaintiff was engaged; and situated as these premises were situated, with reference thereto. You are to exclude remote and purely speculative injuries, and to include only such direct and natural injuries as result from the construction and running of the road, and the building of their works on the land taken. If the plaintiff had in the ordinary, usual, and reasonable prosecution of his business on the land, made use of the same for rearing and fattening stock, and might in the future in the ordinary course of his business continue to rear and fatten stock, and if you further find that by the erection and construction of defendant's works on the lands taken, the value of plaintiff's use of the remainder has been materially impaired or lessened, or if he is by such works merely impeded and obstructed of access to that portion of the tract not taken—which lies

across the track from the business buildings—you will consider the depreciation in value by reason of such taking, and the construction by reason of his being so impeded and obstructed of access; and by reason of such use being so materially impaired in the value of the use by said plaintiff in his business, in fixing the amount of damages, you will allow him therefor.

5. The plaintiff or his successor in the ownership of the lands is perpetually entitled to the use, benefit, and enjoyment of the waters of Mill creek, within the banks and on the bed of the same, as said waters flowed at and prior to the time of the taking of the land, and the construction of defendant's works on the land taken by the benefit of such waters, the company had no right to deprive him, at least until they had made suitable and actual compensation therefor. The amount of such compensation will in part constitute the damages which you are to allow to the plaintiff by reason of such taking.

8. If you find that the defendant company has actually appropriated to its own use by them of the parcels of land described in its notice of condemnation, then the mere fact that it neglected to have the commissioners appraise that parcel on the west side of the right of way, is wholly immaterial; and you may allow in this proceeding, in addition to the other items of damage, the fair market value of said parcels so appropriated, which is on the west side of same right of way.

10. If the defendant company at the time of its appraisal of damages herein, intended to permanently obstruct and turn the waters of Mill creek out of their customary course, though over and upon a part of plaintiff's remaining land, or if it had any effect or made such diversion at the time fixed by the appraisal of such damages, it was its duty to have such damages arising from such diversion fixed and included in said award; and it is now your duty to allow the damages for such diversion.

The jury found for the plaintiff and assessed his damages at fifty (50) dollars. A motion for new trial was made by the plaintiff which was overruled, and he brings the cause to this court by appeal.

There are no assignments of error and we are left somewhat in the dark as to points relied upon by the plaintiff to reverse the judgment in this case. He claims, however, that if the diversion of the water-course in the construction of the road-bed of the railroad was not necessary, then that the condemnation proceedings should have been dismissed at the cost of the appellee, as to the parcel marked on the map as situated on the east side of the right of way, and he cites sec. 86, chap. 16 of the Compiled Statutes; but it should be borne in mind that at the time of the condemnation proceedings appealed from, the stream had already been diverted and the embankment of the railroad constructed; therefore the question of the necessity of the diversion of the stream was no longer pending. Nor does it seem that the appellant appealed from the condemnation of the said land, but only from the award of damages made by the said commissioners.

A somewhat novel and interesting question is presented by the record in this case. It will be remembered that the appellant had sold and conveyed to the railroad company the right of way over and across his land. These condemnation proceedings were commenced by the railroad company for the purpose of condemning a strip of land on the east side of the railroad right of way, for purposes of an artificial water course along and over a portion of appellant's land, rendered necessary by the changing of the channel of the small stream called Mill creek in the construction of the railroad and embankment thereof across said land, and a like strip on the west side of said railroad claimed to be necessary for the purpose of constructing a "Y" connecting said railroad with the line of the B. & M. railroad; the latter named strip in point

of fact covers a portion of the old bed of the stream diverted as aforesaid. Under these condemnation proceedings, the appellant claims the right to have considered the damages probable to be sustained by him in consequence of the separation of his land into two parcels by the construction of the railroad itself; the right of way for which had been previously granted and conveyed by him to the railroad company. Also damages for the diversion of the stream which had already been an accomplished fact before the origin of this proceeding; and it is obvious that the use to which the lands now proposed to be condemned, did not divert the stream; but as to one of them it is to furnish an artificial channel to answer the purpose of the old stream. Appellant cites authorities tending to establish the position that upon the assessing of damages for a right of way across a tract of land, it is proper to take into consideration every species of damage which the construction of the railroad is likely to cause to the land or its owner; and from these authorities he draws the argument that he is entitled under these condemnation proceedings to introduce evidence of the damages proposed by the occupation of the right of way sold and conveyed as aforesaid.

If the appellant is correct in this position, then it might be argued that inasmuch as the purchase from him by the railroad company of the right of way was equivalent to and took the place of condemnation proceedings, and all damages were taken into consideration in that contract of purchase and sale, that he has been compensated for all the damages which any or all of the testimony offered by him could possibly have established. But while we express no opinion as to whether such damages were legally considered in such purchase and sale, leaving that to be considered when it may be properly presented, yet the cases cited fall very far from establishing the position claimed for them by him.

I think that if instead of granting the right of way to

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the railroad by deed as he did, he had left the company to the ordinary proceedings by condemnation, he might have claimed that the damage which would arise from the diversion of the stream should be taken into consideration by the commissioners in making their award of damages. Had the railroad company resisted this claim they might have been enjoined from diverting the stream; but having made the conveyance, as I must presume, upon a valuable consideration, he must be left to his remedy for damages for the diversion of the stream to a suit wherein the question as to whether such diversion was or was not contemplated in the said contract of conveyance can be properly presented by pleadings and evidence; and that such question cannot arise in this proceeding to condemn premises for purposes which did not tend to the injury complained of.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

HENRY W. NELSON, APPELLANT, V. JESSE GAREY,
APPELLEE.

1. **Assignment: PREFERENCE.** Under the act of 1877, Compiled Statutes, chap. 6, an assignment for the benefit of creditors must be without preferences. If any preferences are made, that part of the assignment will be held void. But this act does not prevent a debtor, though in failing circumstances, from preferring a creditor by a separate and independent conveyance unconnected with the transaction of making the assignment, even though the preferred creditor be the assignee named in the assignment subsequently made.

2. ———: **MORTGAGE MADE SAME DAY OF ASSIGNMENT.** The fact

15	531
17	278
19	48
20	54
20	96
22	504
15	531
30	131
31	533
15	531
45	140
15	531
50	419

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that a mortgage was made to a creditor the same day of the assignment, if made *bona fide* and without fraudulent intent, will not render it a part of the assignment so as to convey the mortgaged property in trust for creditors.

APPEAL from Valley county. Heard below before TIFANY, J.

Charles E. Magoon, for appellant, cited: *Giddings v. Sears*, 115 Mass., 505. *Lininger v. Raymond*, 12 Neb., 25. *Mussey v. Noyes*, 26 Vt., 462. *Curtis v. Leavitt*, 15 N. Y., 197. *Davis v. Anderson*, 1 Kelley, 176. *Harkraker v. Leiby*, 4 Ohio St., 602. *Doremus v. O'Harra*, 1 Id., 45. *Lyon v. McIlvaine*, 24 Iowa, 9. *Dodd v. Hills*, 21 Kan., 709. *Bates v. Coe*, 10 Conn., 280.

Coffin & Grimes and *Martz & Williams*, for appellee, cited: *Burrill on Assignments*, 220-224. *Atkinson v. Jordan*, 5 Ohio, 293. *VanPatten v. Burr*, 3 N. W. R., 114.

REESE, J.

The question in this case is, whether there was sufficient evidence before the district court to justify it in holding that a certain chattel mortgage executed by the assignor to the assignee, on the same day on which a general assignment was made, was in fact a part of the general assignment and that the two were one and the same instrument.

Section 5 of the act of 1877, under which this assignment was made, provides that: "All assignments of property in trust which shall be made by any debtor on account of inability at the time of the assignment to pay his debts, to prefer one or more creditors (except for the payment of wages of labor) shall be held and construed to inure to the benefit of his creditors in proportion to their respective demands, and all such assignments shall be subject, in all respects, to the provisions of this act: *Provided*, That the

claims of laborers thus preferred shall not severally exceed the sum of one hundred dollars." Comp. Stat., chap. 6.

By this section it is very apparent that if the deed of assignment contains any provisions by which preferences are made, those provisions are void and the assignee will be treated as holding all the assigned property in trust for all the creditors, the proceeds to be distributed among them *pro rata*. Therefore if it is true that the chattel mortgage and the assignment can, in the light of the facts, be considered as "one and the same instrument," then the decision of the district court is correct. There was no testimony taken as to the principal facts upon which the order was based and we are left wholly to the records from which to draw our conclusions. These records consist mainly in the various proceedings in the matter of the assignment. Taking the evidence as it is, we find that on the 9th of January, 1882, Nelson, the appellant, signed a stay bond for Harter to secure a judgment for \$332.91 in favor of A. Stacy, and on the 13th day of January, 1882, he became surety for Harter on certain promissory notes payable to Meyer & Schurman for \$604.93, and that at the time of signing said bond and notes Harter agreed to secure him from all loss or damage resulting from becoming such surety. At these times Nelson had no knowledge of any intention on the part of Harter, if any existed, to make an assignment. On the 14th day of January of the same year, and prior to the assignment Harter executed to Nelson the chattel mortgage in question on a part of his property, and which was filed in the office of the county clerk on the same day at one o'clock and fifty minutes in the afternoon. On the same day Harter executed a general assignment of all his property to Nelson for the benefit of his creditors. This assignment was filed for record at two o'clock and ten minutes in the afternoon of that day. Nelson immediately took possession of all the property. The inventory shows that there was sufficient property to pay all the debts, but

a large portion of it was afterward destroyed by fire. At the time of the execution of the mortgage the mortgaged property was separated from the other property and sufficiently described and identified by the mortgage.

It must be conceded that if the chattel mortgage was executed in good faith in pursuance of an agreement to secure Nelson against loss growing out of his suretyship for Harter, prior to the making of the assignment and without the intention to divert the property from an assignment then agreed to be made, the decision of the district court that "the mortgage and the assignment are one and the same instrument" is incorrect. But if the assignor and assignee consulted together prior to the making of the mortgage and then agreed upon the course which was afterwards pursued, and in pursuance of that agreement made both of the instruments at the same time—that is, during the same transaction—then the decision is right.

We have examined the record carefully, and are wholly unable to discover any evidence which will justify the latter conclusion. It is undisputed that Nelson became surety for Harter, as he claims, that Harter agreed to secure him for so doing, and that Nelson had no knowledge of any intention on the part of Harter to make an assignment. There is no intimation anywhere of any fraudulent intention on the part of either Nelson or Harter. If the mortgage was executed under these circumstances, we think it is clear it could not be considered a part of the assignment. There is no proof as to how long the mortgage was made before the assignment. The only evidence upon this point was the time at which the respective instruments were recorded. It is claimed by the appellee that of late the tendency of law has been toward a restriction of the right to prefer creditors by insolvent debtors. Such is undoubtedly the case where that preference is made by the assignment; and this is usually controlled by the statutes of the several states upon the subject of assignments, as in

Nelson v. Garey.

this state. It is said in Burrill on Assignments, sec. 167: "It is to be observed, however, that even in some of those states where preferences in assignments have been either actually prohibited by being declared void by statute, or virtually prohibited by being rendered inoperative, the prohibition has been confined by the courts to cases of *general* assignments, where the preferences are given by the *assignment itself*, or by some instrument or act so connected with it as to be deemed in law a part of the same transaction, and has been held not to extend to distinct special transfers of property in payment or security of some particular debt." In the case of *Lininger v. Raymond*, 12 Neb., 25, this court has held that "a debtor, even when in failing circumstances, has a right to pay a *bona fide* demand of one of his creditors to the exclusion of the others. This is a right of which the law has not undertaken to deprive him."

It is claimed that the conduct of the assignee in reporting the mortgaged property with the unmortgaged and the payment of the debts for which he was surety out of the assets of the assigned estate, are sufficient to show that he accepted the conveyance by the mortgage in trust, which, under the statute above quoted, must inure to the benefit of the creditors. We think otherwise. The mortgage conveyed to Nelson the legal title to the property, subject to the conditions of the mortgage. *Clopper v. Poland*, 12 Neb., 69. The assignment conveyed to him the assignor's right of redemption. He could have foreclosed the mortgage, but as that would have caused delay, expense, and possibly a sacrifice of the property, he was justified in disposing of it as he did, and in his reports to the court making a full exhibit of all his proceedings, showing what disposition he had made of the mortgaged property to the extent of indemnifying himself, by paying the debts for which he was surety, and giving the creditors the benefit of the remaining property. He has, apparently, acted in

good faith in all things connected with this assignment, and so far as is shown has discharged his duty to all parties.

After a careful review of the case, and of the points made by counsel for the appellee, we find no ground upon which the judgment can be upheld.

The judgment and decree of the district court requiring the assignee to account for \$713.94 with interest, etc., is reversed, and the report of the assignee is in all things confirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

15	536
91	865
24	872
24	706
15	536
57	91
15	536
60	387

JOHN GILLESPIE, PLAINTIFF IN ERROR, v. WINONA S. SAWYER AND ANDREW J. SAWYER, DEFENDANTS IN ERROR.

- 1. Deeds: DESCRIPTION OF LAND MUST GOVERN.** In an action between others than the original parties to a deed, the intention of the parties to the conveyance cannot be enquired into for the purpose of ascertaining the land sought to be conveyed, if the calls in the deed refer to fixed monuments or points.
- 2. ———: ———: PAROL PROOF INCOMPETENT.** Where there is a call in a deed, which was in fact not intended by the parties, and is unambiguous, the intention of the parties cannot be made to take the place of the call, neither is parol proof competent to locate the land.
- 3. Ejectment: ESTOPPEL.** In an action of ejectment, where an equitable defense is pleaded, and under the allegations of the answer it is shown that the defendant bought the land in question in good faith for a valuable consideration, taking immediate possession thereof, and with the knowledge of the plaintiff made valuable and lasting improvements thereon, the plaintiff taking no steps to notify defendants of his claim, *Held*, That he was estopped to set up his rights as against them.

Gillespie v. Sawyer.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Marquett, Deweese & Hall, for plaintiff in error.

Description in deed. *Williams v. Warren*, 21 Ill., 550. *Willey v. Snyder*, 34 Mich., 60. Estoppel. *Lucas v. Hart*, 5 Iowa, 415. *Copeland v. Copeland*, 28 Me., 525. *Board v. Lincoln*, 81 Ill., 156. *Holmes v. Crowell*, 73 N. C., 613. *Mayo v. Cartwright*, 30 Ark., 407. *Green v. Prettyman*, 17 Cal., 401.

J. R. Webster and *A. J. Sawyer*, for defendants in error, cited: *Wendell v. Jackson*, 22 Am. Dec., 635. *McAfferty v. Conovers*, 7 Ohio St., 104. 34 Ind., 167. 9 N. Y., 197. Bingham on Sales, 425. *Frey v. Drahos*, 6 Neb., 9. *Mills v. Miller*, 4 Neb., 444. 2 Smith's Leading Cases, 652. Bigelow on Estoppel, 434.

REESE, J.

This is an action in ejectment. The petition contains the usual averments.

The answer denies the facts alleged in the plaintiff's petition, and presents several defenses, one of which is, in substance, that they purchased the real estate in dispute on the 29th day of July, 1876, of one L. C. Burr, who was the owner of said premises by title derived from the plaintiff's grantor. That at the time of their purchase and for a long time thereafter they had no knowledge of the plaintiff having or claiming to have any interest in said land. That they purchased in good faith and for a valuable consideration. That at the time of said purchase they took immediate possession of the land, which was unimproved, and have from that time to the present occupied the same as their home, making valuable improvements thereon to the extent of \$4,000, and have ornamented and beautified

it by grading and filling up a ravine running through it, and by planting out many fruit, ornamental, and shade trees, etc., and that during all this time the plaintiff has resided on an adjoining block, and has witnessed their labors and expenditures, but did not at any time notify them of his pretended claim until immediately before the commencement of this action, or that he claimed any interest in the premises.

A trial was had to the court resulting in a finding and judgment in favor of the defendants. Plaintiff now brings the case into this court by petition in error.

As we view the case, the first question requiring attention is, whether or not the deed from Editha J. Dawson, the common source of title, to the plaintiff, which was on record at the time of defendants' purchase, was sufficient to impart constructive notice to the defendants of plaintiff's rights.

The description of the premises contained in the plaintiff's deed is as follows: "That piece or parcel of land adjoining Lincoln, in the county of Lancaster, and state of Nebraska, bounded by a line commencing at a point five chains south of the north-east corner of the east half of the south-west quarter of section number twenty-five (25), in township number ten (10), range six east, running thence two chains and sixty-six links south to the continuation of "F" street in capitol addition to Lincoln, thence along F street in said addition ten (10) chains, thence north two chains and sixty-eight links to the corner of the five-acre tract purchased by said Gillespie of Jacob Dawson, thence west to the place of beginning."

By following the calls, courses, and distances in this deed as they are given, it is clear that it fails to describe any tract of land, as they fail to close.

The plaintiff insists that by following the line to the fifth call, which is described as "the place of beginning," and taking this as the starting point, and following the

calls, courses, and distances in their inverse order it will describe the tract in dispute, since there is nothing in the deed indicating the course along F street. This is perhaps true.

The defendant insists that if we begin at the first call, the starting point being definitely given, it is impossible to so construe the description as to include this tract of land. This is also true.

The first call in the deed fixes the starting point "five chains south of the north-east corner of the east half of the south-west quarter of section twenty-five." Were this action between the original parties to the deed, the intention of the parties might, with propriety, be inquired into. But in this case, where the rights of innocent third parties intervene, we think this call cannot be changed. "Five chains south of the north-east corner" of the government subdivision is a definite and fixed point as, and for, the north-east corner of the land sought to be conveyed, and it must govern. In *McAfferty v. Conover's Lessee*, 7 Ohio St., at page 104, the supreme court of Ohio uses the following language: "But where there is a call in a deed which was in fact not intended by the parties, and is found and is unambiguous, the intention of the parties cannot be made to take the place of the call, for if this could be done titles and lands would be transferred by the intention of the parties, and not by deed. Effect will be given to the intention of parties, in respect to calls, only where the words of description they employ will admit of it, and are not inconsistent with the intention proved; further than this a court of law cannot go; beyond this is the region of equitable jurisdiction, under the head of mistake." See also *Piercy v. Crandall*, 34 Cal., 343. *Jackson v. Wendell*, 5 Wend., 146. 1st Greenleaf Ev., § 391.

We therefore conclude that the description given in the deed as between these parties, must stand without explanation or change by parol proof, and that the recording of

said deed was not of itself sufficient to give notice of the alleged rights of the plaintiff. *Galway, Semple & Co. v. Malchow*, 7 Neb., 287.

2. The answer of the defendants presents an equitable defense, which, under the proofs in this case, is an abundant defense to the plaintiff's action. It is alleged and proven that at the time of their purchase, they had no actual notice of plaintiff's rights; that the land was vacant and unoccupied. True, it had been plowed and a hedge planted around part of it, but the plowed land had grown up to weeds and grass, and the hedge had been almost entirely destroyed by fires; that a few fruit trees had been planted thereon, but they were about killed by fire and weeds, and hardly visible; and in the improvement which followed, little if any attention was paid to them. No person was in actual possession, and from the evidence it is clear no person had been for some time. That fact was apparent. The defendants took possession at once, and made lasting and valuable improvements thereon, and have resided on the premises ever since, erecting buildings, grading up the low places, planting fruit and ornamental trees and shrubs, inclosing the grounds with fences, hedges, etc., in short making a comfortable and desirable home. During this time the plaintiff has resided within four or five hundred feet of the premises, on a contiguous block, in full view of all these improvements and expenditures, had seen one of the defendants almost daily, and has never at any time, from the time of their purchase and possession, until a short time before the commencement of this suit, made known to them his alleged right to the property. His silence is sought to be explained by a want of knowledge of his rights under his deed, and by the advice of counsel. While it may be true that he did not fully understand his legal rights, under his deed, yet it is hardly probable he did not know it would be wrong to allow the defendants to make the improvements they were making

Thurber v. Sexauer.

on land which he claimed, and to which his title was defective, without at least telling them of his claims. In *Kirk v. Hamilton*, 102 U. S., it is said: "There is no principle better established in this court, nor one founded on more solid considerations of equity and public utility, than that which declares that if one man knowingly, though he does it passively by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his own claim, shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel." See also *Fremont Ferry and Bridge Co. v. Dodge County*, 6 Neb., 25. *Roy v. McPherson*, 11 Neb., 200.

We are of the opinion that both the law and the equities of this case are with the defendants. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

MAXWELL, J., concurred.

COBB, CH. J., took no part in the decision.

HORACE K. THURBER ET AL, PLAINTIFFS IN ERROR, V.
ROSANNA SEXAUER ET AL., DEFENDANTS IN ERROR.

Attachment. Upon examination of the evidence, *Held*, That the ruling of the district court discharging the attachment was not erroneous.

ERROR to the district court for Douglas county. Heard below before NEVILLE, J.

Charles Ogden, A. C. Wakeley, and John D. Howe, for plaintiffs in error.

H. D. Estabrook, for defendants in error.

REESE, J.

The plaintiffs in error procured the issuance of an order of attachment and caused it to be levied upon the property of the defendants in error. Defendants then filed their motion to dissolve the attachment for the reason that the facts did not warrant the issuance of the writ. The motion to discharge the attachment was resisted, and a number of affidavits were presented by both parties. Upon the hearing the motion was sustained, and the attachment discharged. The plaintiff in error brings the cause into this court, and assigns the ruling of the court in discharging the attachment as error.

It appears that the defendants in error were engaged in the grocery trade at Omaha and were indebted to various parties to the amount of about \$5,000, and had property of the value of about \$8,000 over and above exemptions. On the question of the valuation of their property there is a conflict in the testimony, some putting it at less than the above, and some at more. A part of their indebtedness had matured, and some of it had been due for some time. A short time prior to this time, one Pratt, who claimed to represent a mine in Colorado, known as the Eurisco mine, approached the defendant, William Sexauer, who was the husband and agent of the defendant, Rosanna Sexauer, with a view of selling him shares of stock of said mine, and from the description given, and representations made by him, Mr. Sexauer was induced to purchase three thousand shares of said stock, paying therefor three thousand dollars, that being ten per cent of their face value. In order to complete this purchase, money was necessary, and the defendants in error applied to a number of loan agents in Omaha for a loan of \$4,500 on their real estate but failed to procure it. They then borrowed the money of one

Mathew Sexauer, of Des Moines, Iowa, and executed to him a mortgage of \$4,500 on their real estate in Omaha, and, as is claimed by them, received about \$4,300—the interest for six months being deducted—\$1,900 of which they paid to Pratt, and \$1,000 on her indebtedness, and after paying out other sums she had \$800 left on hand. They also paid Pratt on their purchase of stock, about \$300 in groceries out of the store, being a part of \$1,000 worth of groceries which they were to pay in six months.

Upon the filing for record of the mortgage from the defendants in error to Mathew Sexauer, Morgan & Gallagher caused an attachment to be issued and caused the same to be levied upon the property of defendants in error, whereupon Mrs. Sexauer made a general assignment for the benefit of their creditors.

It is alleged by the plaintiffs in error that the purchase of the mining stock of Pratt was a fraud upon the creditors of defendants in error; that the stock was of no value, and that the Eurisco Mining Company is unknown and is entirely fraudulent. The affidavits of certain brokers in Denver were made and they testify that they have no knowledge of any such mine or mining company, while Pratt testifies that the description of said mine which is set out in the evidence and which was presented to the defendants in error is true in every particular, as he believes, and that he has sold \$1,000 worth of similar shares at the same rate.

The affidavit for attachment alleges two grounds. 1st, The defendants have disposed of a part of their property with the intent to defraud their creditors; and 2nd, That the defendants are about to convert their property into money for the purpose of placing it beyond the reach of their creditors. The first alleged cause for attachment appears to have been the one to which the proofs have been mainly directed by the plaintiff in error.

That the purchase of the mining stock by the defendants

in error was a foolish venture might be true, and yet there be no fraudulent intent on their part. So far as mortgaging their property is concerned it is clearly shown that applications to loan agents in Omaha were made, and that without any secresy, and in fact we think it is conceded that the money was actually received from Mathew Sexauer by the defendants in error. We think the court was justified in finding that the money had been paid out by them as stated in the defendants' affidavits. The defendants may have been defrauded by Pratt and induced to part with their money by his graphic description of his mine, and yet be guilty of no fraud themselves.

Had this mining stock proved to have been as valuable as is set out in Pratt's "description," which is attached to his affidavit, and which was presented to the defendants, no one would have thought of charging them with any fraudulent intent.

As to values of property and the conduct of defendants in error, the testimony was conflicting, but the finding of the lower court, upon the facts, about which the conflict exists, should not be set aside unless it is clearly wrong.

There appears to be scarcely any proof to sustain the second alleged cause for attachment, and as it is substantially disposed of in the foregoing, it need not be further noticed.

No error affirmatively appearing in the record, the order of the district court is affirmed. By the court,

ORDER AFFIRMED.

GEO. W. HOMAN, PLAINTIFF IN ERROR, v. JAMES R.
BOYCE, DEFENDANT IN ERROR.

Principal and Agent: ACTION FOR DEATH OF HORSE: EVIDENCE.

In an action by B. against H. for the value of a horse which B. had left at the livery stable of H. with permission to occasionally let him to proper and careful drivers, and which had been let on the 4th day of July to an improper person, was overdriven and not properly cared for, from the effect of which he died on the 8th of July following, a statement made to B. by the agent of H. and foreman and general manager of said livery stable, as to the condition and appearance of the horse when returned to the stable July 4th, his symptoms since that time, and at the then present time, was properly admitted in evidence on the part of the plaintiff, having been made at the same time of the depending transaction, and constituting a part of the *res gestae*.

ERROR to the district court for Douglas county. Tried below before WAKELEY, J.

Webster & Gaylord, for plaintiff in error cited: *Fairlie v. Hastings*, 10 Ves., 126. *White v. Miller*, 71 N. Y., 118. 1 Greenleaf Ev., 141. *Luby v. Hudson River R. R.*, 17 N. Y., 131. *Anderson v. Railroad*, 54 N. Y., 340. *Ryan v. Gilmer*, 2 Mort., 517. *Robinson v. R. R.*, 7 Gray, 92. *Packet Co. v. Clough*, 20 Wall., 528.

W. J. Connell, for defendant in error, cited: *O. & M. R. R. Co. v. Porter*, 92 Ill., 437. *Morse v. Conn. R. R. Co.*, 6 Gray, 450. *Curtis v. Avon R. R.*, 49 Barb., 148. *Maher v. Chicago*, 38 Ill., 273. *Dowdall v. Penn. R.*, 13 Blatch., 403. *Burnside v. Grand Trunk*, 47 N. H. 554.

COBB, CH. J.

James R. Boyce, defendant in error, was the owner of a horse, which he kept in the livery stable of Geo. W. Homan, senior, plaintiff in error. An understanding was had be-

Homan v. Boyce.

tween said Boyce and Homan, that Homan might let the horse out for hire to a good careful driver, and accordingly said Homan did let said horse for hire, on the 4th of July, to a couple of young men to drive to Pries' lake, a distance of about seven miles. The horse was returned at about nightfall, showing that he had been overdriven and not properly cared for, refusing to eat or drink. The next morning the horse was sick, and grew worse for several days, when he died. This action was brought by Boyce in the court below against Homan for the price of the horse. A trial was had to a jury who found in favor of the plaintiff. A motion for a new trial was made and overruled, and judgment was rendered for the plaintiff for \$77.84, being \$114 for the horse, less Homan's bill with interest, \$36.16. The case was brought to this court on error.

There are but two errors insisted upon : First, That the verdict of the jury is not sustained by proper evidence; and Second, That the court erred in permitting the plaintiff to give in evidence the declarations of Henry Homan, Jr., made on July 7th, which was three days after the driving of the horse, which it is alleged caused its sickness and death.

The question was: What he (meaning Henry Homan, Junior) said then : What conversation you had with him concerning the horse when you came in? (meaning July 7th). The court said he might answer as to what Henry Homan said as to the condition of the horse. The witness answered, "When I went to the stable on information received, a friend of mine informed me that the horse was sick. I found he was sick, and asked Mr. Homan what was the matter with him? He said the horse had been sick from the time he came in on the fourth of July, but he did not consider it dangerous until that day; he hadn't eaten anything since he had come in; and my impression is he said when he came in he was not sweating at all but was hot, and he thought he was melted on the inside."

Henry Homan, Junior, was the agent and General Manager of the defendant below ; and it was he that had in fact let the horse as above stated. It is contended by the plaintiff in error that said Henry Homan, Junior, being but his agent, his declarations as above testified to were inadmissible as against him ; and many authorities are cited in support of this proposition.

Under the authorities a declaration of the agent, in order to bind the principal must be made at the same time—that is, contemporaneous with and constitute a part of the *res gestæ*.

When it is borne in mind that the keeping and care of the horse, the manner in which the horse was cared for, the degree of carefulness in letting him, his condition after being let, and the failure to deliver him in a sound condition to the owner when called for, and his sickness and death from some cause, was the *res gestæ* in this case, I am unable to see why the statement of his condition during any portion of the time covered by the above, by the agent as stated by the witness, was not a part of the *res gestæ*.

On the other point I am unable to see in what respect the evidence fails to uphold the verdict. The testimony is to the effect that the horse had been in the stable and under the care of the plaintiff in error for a considerable time ; that he had suggested to the defendant in error that the horse ought to be driven for his own benefit ; that the horse was in excellent physical condition, and had never been sick, or known to refuse his food, but was too fat and soft by reason of not having received sufficient exercise. Mr. Boyce yielded to the suggestion of Mr. Homan sufficiently to authorize him to let the horse occasionally, but only to reliable and responsible persons who would drive the horse as carefully as would either of the parties ; both of whom are old gentlemen, and easy, careful drivers. Upon this authority, the agent of the plaintiff in error, on the fourth of July, a day which is notoriously hard upon livery

stock, let the horse to two young men whom he did not know and without inquiry as to their answering the requirements above set forth, and who proved to be not careful or proper persons to intrust with such an animal on a hot day as that proved to be. They drove the horse to the place designated, let him stand all day without water, and drove back to the city, the horse being in such condition as to excite the remark of strangers that he was being overdriven; when returned to the stable he was in a hot feverish condition, refused his food, was sick the next morning, and continued so for about four days, when he died. Counsel argued with considerable force that under these circumstances there was no presumption that the horse was overdriven and died from that cause. While there is probably no legal presumption in the case, yet it was a matter peculiarly for the consideration of the jury. The care of, dangers to, and everything concerning horses are matters better understood by the average juryman than by the professional expert.

The evidence is that the horse died in the possession of the plaintiff in error. If he wished to, it was quite in his power to have had an autopsy of the animal and thus enabled himself to prove that his death was occasioned by other causes, if such was the fact. And I think the burthen of doing so was upon him rather than upon the defendant in error, and I think the jury were justified, under the evidence as given them, in coming to the conclusion that it was the letting of the horse, in violation of the conditions made by the defendant in error, to an improper person and his improper treatment by such person, that caused his loss; and upon the whole I think the jury reached the only conclusion open to them under the circumstances.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

CHARLES H. GOULD AND THOMAS P. KENNARD, AP-
PELLEES, v. NERIAH B. KENDALL AND CHARLES
D. SMITH, APPELLANTS.

15	549
17	538
15	549
41	492
15	549
46	587
15	549
55	380

1. **Contract against public policy.** No court of law or equity will lend its assistance in any way towards carrying out an illegal contract; therefore such contract cannot be enforced by one party against the other, either directly, by asking the court to carry it into effect, or indirectly, by claiming damages or compensation for a breach of it. *Sykes v. Beadon*, 11 Ch. Div., 170.
2. ——. A contract by which G. & K., who were the holders of a license to trade with the Indians at Fort Peck Indian Agency, agreed to pay to K. & S. the one-half of the net profits of such trade, for the consideration of the said K. & S. purchasing all goods and supplies necessary and proper for said trade at their own account and credit, and immediately resell and invoice such goods to G. & K., at said agency, at cost price, cost of transportation and insurance added, and one of the said K. & S. take entire charge, management, and control of said business, devoting his entire time and attention thereto, and residing at Fort Peck, is illegal, for the reason that it contemplates the violation of the statute as well as the public policy of the government of the United States.

APPEAL by defendants from a decree of the district court of Lancaster county, POUND, J, presiding.

THE action was brought to settle an alleged partnership claimed to exist under the contract alluded to in the opinion. This contract was as follows:

“Memoranda of agreement, executed in duplicate, made and entered into this fifth day of June, A.D. 1879, by and between Charles H. Gould and Thomas P. Kennard, of Lincoln, Nebraska, parties of the first part, and Kendall & Smith, a firm composed of N. B. Kendall and Charles D. Smith, doing business at Lincoln, Nebraska, party of the second part, witnesseth, that

" WHEREAS, The said Charles H. Gould and Thomas P. Kennard have been appointed by the general government as Indian traders at Fort Peck Indian Agency in Montana territory, and have organized the firm of Gould & Kennard to carry on the business of traders at said agency; and, WHEREAS, the said Kendall & Smith are desirous of obtaining an interest in the business and profits of said agency trade; it is therefore agreed by and between the said Gould & Kennard, of the first part, and the said Kendall & Smith, of the second part, that the said Gould & Kennard shall pay to the said Kendall & Smith one-third part of the net profits of the business at said agency for the entire time the said Gould & Kennard shall hold a license from the general government, unless this contract should sooner be revoked and annulled by the unanimous agreement of the individual parties thereto, said payment of the one-third part of the net profits to be made as hereinafter stated. In consideration whereof the said Kendall & Smith do agree as follows, to-wit: That they will, so soon as directed thereto by the said Gould & Kennard, or as soon thereafter as may be, purchase at their own expense, in their own name or names, and on their own account and credit, all the stock of goods, of quality, quantity, and variety sufficient to properly stock the agency store of the said Gould & Kennard at Fort Peck Indian Agency, and to make, such other like purchases from time to time as may be necessary to properly keep up said stock. All of which said goods so purchased from time to time as required shall when so purchased, be immediately consigned, resold, and invoiced to the said Gould & Kennard, at the said agency, at the same price at which they were purchased, the necessary expense of transportation, insurance, and traveling expense incident to said purchase only to be added. The said Charles D. Smith will take entire management and control of said business, and of the buying and selling, devoting his entire time and attention thereto, and residing

at Fort Peck; he shall keep the books of accounts, or cause them to be properly kept, and said books shall always be subject to inspection by the parties hereto. He shall employ the necessary clerks for the proper conduct of said business, except that the said Gould & Kennard reserve the right to appoint two of said clerks, subject to approval by the said Smith; he shall pay all the expense of whatsoever nature of said business out of the proceeds of said business, and shall, out of said stock of goods, or the proceeds thereof, pay the said Kendall & Smith for their purchases, on account of the said Gould & Kennard, and shall render a semi-annual exhibit or statement of said business, showing the amount of stock on hand, the liabilities on account of stock, and the net cash profits as near as may be, and the said Kendall & Smith shall then have a right to demand and receive from said Gould & Kennard seventy-five per cent of one-third part of the said net cash profits, the remaining twenty-five per cent of said net cash profits to be paid the said Kendall & Smith at the expiration of the license of said Gould & Kennard, or on the annulling and revocation of this agreement as hereinbefore provided. It is further agreed and understood between the parties hereto, that the said Gould & Kennard shall be privileged to withdraw seventy-five per cent of two-thirds of the net cash profits at the same time the said Kendall & Smith are paid as above provided." (Signed by the parties.)

Modified as follows:

"This contract is hereby amended and modified to read as follows, to-wit: And the said Gould & Kennard shall pay to the said Kendall & Smith, at the times, and in the manner hereinbefore stated, an equal one-half part of the net profits of the business, and everything herein inconsistent with this modification is this day abrogated." (Signed by the parties.)

Mason & Whedon, for appellants, cited: *East Jersey v. Wright*, 5 Stew. Eq., 253. *Railway v. Hoboken*, 1 Vroom, 75. *Caldwell v. Fulton*, 31 Penn. State, 477. *Holt v. Green*, 73 Id., 198. *Coppel v. Hall*, 7 Wall., 558. *Watson v. Murray*, 23 N. J. Eq., 257. *Todd v. Rafferty*, 30, Id., 254. *Snell v. Dwight*, 120 Mass., 9. *Thompson v. Thompson*, 7 Ves., 470. *McBlair v. Gibbs*, 17 How., 237.

J. R. Webster, for appellees, cited: *Brooks v. Martin* 2 Wall., 70. *McBlair Gibbs*, 17 How., 232. *Armstrong v. Toler*, 11 Wheaton, 258. *Planter's B'k v. Union B'k*, 16 Wall., 483. *Kinsman v. Parkhurst*, 18 How., 289. *Tennant v. Elliot*, 1 B. & P., 3. *Farmer v. Russell*, 1 B. & P., 296. *Thompson v. Thompson*, 7 Ves., 470

COBB, CH. J.

I think this case might be designated a suit in equity for an accounting and damages, or it might be called an action on account at common law. In either view the action is brought directly on the written contract set out and described in the petition, and for its breach. I do not think that the contract can be held to have created a partnership between the parties, even as between themselves. The object in construing a contract is to ascertain the intent of the parties when they executed it. The law will, when necessary, give a name to the relationship established between contracting parties, according to the intent of the parties, as expressed in the words of the contract, and, in cases of doubtful meaning, the relations of the several parties towards each other and towards the subject matter of the contract, as well as their contemporaneous acts and dealings, will all be considered.

Now let us look at the language of this contract. The words partner or partnership are neither used in it through-

out, but seem to have been studiously avoided. The plaintiffs having procured a valuable license to trade with the Indians, and purposing to make that available to the benefit of all parties, it would seem that if a partnership was contemplated the defendants would have been required to contribute something to a common fund. But nothing of the kind is required of them. True, they agree to purchase a stock of goods and to replenish it from time to time in their own name or names, and on their own account and credit—and what shall they do with such goods, put them into the partnership or common stock of all the parties? By no means—but said goods “shall when so purchased be immediately consigned, resold, and invoiced to the said Gould & Kennard, at said agency,” etc. “The said Charles D. Smith will take entire management and control of said business, and of buying and selling, devoting his entire time and attention thereto, and residing at Fort Peck,” etc. Now then, what do the plaintiffs agree to do on their part? Nothing. True, at the commencement of the agreement, they agree to pay to the defendants one-third part of the net profits of the business at said agency for the entire time the said Gould & Kennard shall hold the license from the general government, etc. But that is qualified, by what follows, to mean that the defendants were to keep one-third part of what they could make clear, using their own money, credit, and labor. This, by a subsequent amendment to the contract, was changed to the one-half.

We have seen above what the defendants agreed to do. Now then, what did they do, or fail to do? The petition informs us that “about the 8th day of August, 1879, the said defendants did stock said tradership store, to the amount and value of which stock furnished these plaintiffs are unable to state.” From this point forward, the petition charges a series of violations of the contract, and alleges nothing thereafter done in pursuance of its terms;

all that is done is charged to be to the damage of the plaintiffs. Nothing is alleged to have been done for their benefit. It is alleged that Mr. Gould, one of the "plaintiffs, personally attended at the place of business of said tradership or store, and desired and requested to give his time and personal attention to the proper and lawful conduct of said business; but said Smith then usurped to himself and the other defendant the sole and entire management of said business, and wholly excluded said Gould and both of these plaintiffs from any part in the conduct of said premises." It was evidently the intention of the parties in drawing up the contract that while the defendants, or Charles D. Smith, should be personally present in the Indian country, yet that he should, while there, in a kind of vicarious sense sometimes be Gould & Kennard. That he should buy goods from wholesale dealers as Kendall & Smith, as Kendall & Smith sell them to Gould & Kennard, and as Gould & Kennard retail them out to the Indians. This is what he agreed to do, but it is that which according to the petition he refused to do, and did not do.

If the plaintiffs had placed money or goods in the hands of Kendall & Smith, or of Charles D. Smith, I agree that he could not hold on to it and at the same time claim in a court of equity that he used it for his own use and benefit and not for theirs. They had, in a manner, placed their license in his hands, but in law that gave him no right; and whatever advantage he may in fact have derived from such license cannot be considered, or an account taken of, in a court either of law or equity. The defendants then not having received either money or other valuable thing from the plaintiffs of which the law will take account, they are accountable to them, if at all, solely by virtue of the contract.

Many years ago the government of the United States adopted the policy of prohibiting trade and intercourse

between the people and the Indian tribes, allowing only such persons to reside among and trade with the Indians as should be licensed as traders by the proper officers of the government, together with such clerks and employes as should be approved and specially designated by the officer granting such license. See §§ 2129, 2130, and 2133, p. 372, Rev. Stat. U. S. These licenses, on account of the special privileges thereby granted, have usually been valued quite highly by traders and capitalists on the frontier. The plaintiffs had obtained such a license, and it must be apparent to the reader of the contract entered into between them and the defendants that the sole object of such contract was to put the said defendants in their places as Indian traders, and make the use of their franchise alone balance the combined labor and capital of the defendants in the usufruct of the Indian trade; and the object of the defendants, on their part, was to make their capital and labor, through the borrowed and talismanic power of the plaintiffs' license, yield them a share of the same lucrative trade, without submitting themselves to the approval of the officers of the Indian Bureau. I see no moral turpitude in all of this on the part of either the plaintiffs or defendants, but it involves, on the part of both parties, an attempt to violate the statute as well as the policy of the government by introducing into the Indian country and trade, under color of the plaintiffs' license, the defendants, whose character, as persons fit to be in the Indian country, had not been approved by the proper officers of the government. It need scarcely be said that a contract for such purpose will not be enforced by a court either of law or equity.

The case of *Brooks v. Martin*, 2 Wall., 70, cited by counsel on either side, did not depend, nor was it founded mainly on contract. The equity which carried that case depended on the fact that Martin had placed a large sum of money into the hands of a partnership consisting of

himself, Brooks, and one Field, formed for the purpose of dealing in soldiers' land warrants, "that may have been or may be issued under the law of Congress," etc. Martin, who was a banker, gave no personal attention to this business, which was carried on chiefly by Brooks. The purchase of, or dealing in, soldiers' bounty land warrants already issued was lawful, and the assignment of such warrants binding on the soldier; but the assignment of the title or claim to such warrants made before their issue was declared by statute to be "null and void to all intents and purposes whatsoever." No doubt, as claimed by Brooks in his answer, the purchases made by the partnership consisted mainly of the claims of soldiers before the issue of the warrants. These claims, although their assignment was void in law, were never disputed by the assignors, and were made available to the partnership the same as though the warrants had been regularly assigned after their issue. These claims were converted into lands, mortgages, and money, which, though under the direct control of Brooks and Field, yet were held and acknowledged as the property of the partnership of which Martin was a member, and the capital of which he alone had supplied. Thus matters stood when Brooks, by means of false and fraudulent representations and means, induced Martin to sell to him his interest in the partnership property very far below its value. The main object of the suit was to set aside this sale. An accounting to Martin for his share of the partnership property would follow as a matter of course. The bill need not, nor did it in fact, set up or count upon the contract of partnership or its terms. If it had, such contract did not necessarily involve the violation of the statute. A large and lucrative business could have been done at that time and place by the use of the amount of capital furnished the said partnership by Martin, in the purchase of land warrants already issued. But the court decided the case in favor of Martin, chiefly on the ground

of partnership, and that the property of the partnership was the product of the money furnished by Martin. So far as the case follows *Sharp v. Taylor*, 2 Phillips Ch., 801, the leading case cited by the court, that which it does decide can scarcely be considered as authority, the case of *Sharp v. Taylor* having been severely criticised if not overruled by the same court or its successor in the case of *Sykes v. Beadon*, 11 Ch. Div., 170. I quote a part of the syllabus of the latter case: "No court of law or equity will lend its assistance in any way towards carrying out an illegal contract; therefore such a contract cannot be enforced by one party to it against the other, either directly, by asking the court to carry it into effect, or indirectly by claiming damages or compensation for a breach of it, though there may be some cases in which a party to such a contract may recover from a third person money paid over to that person in pursuance of the contract."

Ch. J. Marshall, in the case of *Armstrong v. Toler*, 11 Wheat, 268, stated the law with great clearness and perspicuity in the following language: "Questions upon illegal contracts have arisen very often, both in England and in this country, and no principle is better settled than that no action can be maintained on a contract, the consideration of which is either wicked in itself or prohibited by law."

We have seen above, to my own satisfaction at least that the plaintiffs and defendants in the case at bar cannot be considered as partners for the want of an intention on their part to establish that relationship, as expressed by the language of the contract, as well as the lack of mutuality of its terms. It cannot be claimed that the plaintiffs are entitled to this remedy for the purpose of following their money or property in the hands of the defendants and claiming a share of its product or earnings, for they have placed neither money, property, or services there. They have given to the defendants, so far as they could, the

egis of their license, for which the defendants promised, them a certain share of the net profits of their business; but as we have seen, the consideration being illegal, that promise cannot be enforced.

It may be claimed that the defendants having done business in the name of the plaintiffs, are estopped to deny the interest of the plaintiffs in that business. That would probably be so could the plaintiff's case ever reach the point at which the defendants are required to develop their defense, but the difficulty is in the inherent weakness of the plaintiff's case. They cannot reach the enemies' works except through the contract, which, by reason of its illegality, is "no thoroughfare" for them. The judgment of the district court is reversed, and the cause dismissed.

REVERSED AND DISMISSED.

THE other judges concur.

PHILIP A. MEESE, ET AL., PLAINTIFFS IN ERROR, V.
THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

Unlawful Assembly. The owner of a dwelling has no authority by force and violence to enter the same and remove the furniture or disturb the party lawfully in possession thereof, and if he do so with other persons, being three or more in all, they may be convicted of unlawful assembly.

ERROR to the district court for Saunders county. Tried below before GEORGE W. POST, J.

M. H. Sessions, for plaintiffs in error.

Isaac Powers, Jr., Attorney General, for the State.

MAXWELL, J.

In October, 1882, the district attorney filed a complaint in the district court of Saunders county, charging that Da-

vid Meese, Phillip Meese, William Owen and Seth Bowers "did unlawfully, riotously, and routously assemble together then and there, with the unlawful intent then and there to do certain unlawful acts with force and violence, against the person and property of her, the said Annetta Meese, to-wit: with the intent then and there unlawfully, violently, and in a menacing manner to assault her the said Annetta Meese, and with the intent then and there unlawfully to break and enter the dwelling house of her the said Annetta Meese, in which she, the said Annetta Meese, then and there dwelt and resided, and with the intent then and there unlawfully to take, remove, and disturb the household goods and effects of her the said Annetta Meese, against the peace and dignity of the state."

On the trial of the cause the jury returned a verdict finding the defendants guilty as charged in the complaint. A motion for a new trial having been overruled, the court imposed a fine of fifteen dollars each on David and Philip Meese, and a fine of five dollars each on Bowers and Owen, together with the costs of the action. A large number of errors were assigned in the motion for a new trial, and are now assigned in the petition in error, but do not seem to be relied upon, as the principal objection urged in the brief is that the testimony does not sustain the verdict.

It appears from the testimony that Annetta Meese, at the time the offense is alleged to have been committed, was lawfully occupying a dwelling house upon lands claimed by one of the defendants below. There is some contention as to the ownership of the land, it being at the time a homestead under the United States statutes, and in dispute. But we attach no importance to the question of title, as whatever the ultimate rights of the parties may be, all the testimony shows that for the time being at least she was lawfully in possession and had been for a number of years. At the time the offense is alleged to have been committed,

the testimony shows that the defendants below went to the residence of Mrs. Meese with lumber and material and erected a shanty adjoining her dwelling and stairs to an upper room, and that they forcibly entered into some of the rooms through a window and removed her goods from the same. All this was done in a violent manner and in clear violation of law. Sec. 26 of the criminal code provides that "if three or more persons shall assemble together with intent to do any unlawful act with force and violence, against the person or property of another, or do any unlawful act against the peace, or, being lawfully assembled, shall agree with each other to do any unlawful act as aforesaid, and shall make any movement or preparation therefor, the persons so offending shall be fined in any sum not exceeding one hundred dollars, and be imprisoned in the jail of the county not exceeding three months."

The law does not permit even the owner of property by force and violence to disturb any one lawfully in possession of the same. And if he with other persons constituting in all three or more, assemble together for the purpose of committing an unlawful act against such person by force and violence, as by forcibly entering the dwelling and removing the furniture and disturbing the possession, they are clearly guilty of a violation of the statute above quoted. The law has provided an adequate remedy for the recovery of the possession of land and does not permit force and violence to take the place of right and justice. The testimony shows beyond question that these parties are guilty; and there is no material error in the proceedings. The judgment must therefore be affirmed.

JUDGMENT AFFIRMED.

COBB, CH. J., concurred.

REESE, J., did not sit in this case and took no part in the decision.

**EPHRAIM ELSHIRE, PLAINTIFF IN ERROR, V. IDA B.
SCHUYLER ET AL., DEFENDANTS IN ERROR.**

1. **Liquors: DAMAGES.** Where, by reason of intoxication, a husband is rendered incapable of providing for his family, the wife may recover against the person furnishing the liquor for the loss of means of support during such intoxication.
2. ———: ———. The statute in effect declares the act of producing intoxication a wrong, and makes every one who has contributed to it by furnishing intoxicating liquor, a wrong doer and liable.
3. ———: ———: **EVIDENCE.** In an action for loss of means of support, injury to the wife's health caused by over work is not a proper element of damage.

15	561
17	418
18	53
19	190
15	561
32	179
15	561
35	228
15	561
40	731
15	561
42	387
15	561
44	444
15	561
53	669

ERROR to the district court for Richardson county.
Tried below before DAVIDSON, J.

E. W. Thomas and C. Gillespie, for plaintiff in error.

Isham Reavis and A. Schoenheit, for defendants in error.

MAXWELL, J.

This action was brought by Mrs. Ida B. Schuyler for herself and children to recover damages of the defendant for loss of means of support from May 1st, 1881, to April 28th, 1882, caused by the sale of beer by Elshire to her husband. Mrs. Schuyler in her petition alleges that Elshire began making and selling beer in Rulo about May 1st, 1881, and from that time until the commencement of the action (April 28, 1882) had continually sold beer to Samuel H. Schuyler, her husband, while he was intoxicated, and in quantities sufficient to produce intoxication, thereby rendering him incapable of earning a support for his family. To this petition Elshire answered in substance that he had

been engaged in manufacturing beer in Rulo since July, 1881, and that Samuel H. Schuyler may have got beer in small quantities from him, but that he had not sold to said Schuyler while intoxicated nor in quantities sufficient to produce intoxication. On the trial of the cause a verdict was rendered in favor of Mrs. Schuyler for \$300.

It is contended on behalf of Elshire that as the intoxication of Schuyler did not cause his death therefore the action cannot be maintained. But this position is entirely untenable. If by means of beer or other intoxicating drink, sold by Elshire to Schuyler, he has been rendered incapable of providing for his family, to the extent of the loss of means of support thus occasioned, the wife may recover, whether it be for a day, month, year, or longer period.

2. The answer admits selling beer to Schuyler, but denies selling the same to him when intoxicated, or in quantities sufficient to produce intoxication. Our former statute made the liability of the person selling liquor depend upon these conditions, *Roose v. Perkins*, 9 Neb., 304; but the statute of 1881 contains no such qualification. It in effect declares the act of producing intoxication a wrong, and makes every one who has contributed to it by furnishing intoxicating liquors a wrongdoer and liable. *Kerkow v. Bauer*, ante p. 150. If injury to the means of support of the wife resulted from such sale, she may recover.

3. The court instructed the jury that "any injury to the health of the plaintiff occasioned by overwork, or excessive labor beyond her physical ability to perform, made necessary by the failure of her husband to support her and her children on account of the continued use of intoxicating liquors of any kind, whether obtained wholly or only in part from the defendant, is a proper element of damages to be considered by the jury," etc. This was clearly erroneous. The action is for loss of means of support—not for wounded feelings or injured health caused by the failure to provide; but to the extent of the loss of support sustained a wife

Shapleigh v. Dutcher.

may recover. For the error in giving this instruction the judgment must be reversed and a new trial awarded.

REVERSED AND REMANDED.

THE other judges concur.

15	563
18	681

SHAPLEIGH & Co., PLAINTIFFS IN ERROR, V. C. E.
DUTCHER, DEFENDANT IN ERROR.

Verdict: EVIDENCE. About the 1st of Dec., 1881, one D. sent a money order for \$3.00 to S. & Co., of St. Louis. A receipt for \$300 was returned. D alleged that on the same day on which the money order was sent he forwarded to S. & Co. a draft for \$300 which he had received in the spring of 1880. *Held*, That the evidence failed to show that the draft in question was sent.

ERROR to the district court for Jefferson county. Tried below before MORRIS, J.

Harwood & Ames and *W. H. Snell*, for plaintiffs in error.

W. O. Hambel, for defendant in error.

MAXWELL, J.

The plaintiff brought an action against the defendant to recover the sum of \$97.92 upon an account. The defendant in his answer admitted the account to be correct, but set up a set-off of \$300. On the trial of the cause the jury found a verdict for \$200 in favor of the defendant. The principal error relied upon in this court is that the verdict is unsupported by the evidence. The date of the first item in the account is Dec. 22d, 1881, and of the last March 23, 1882. It appears that prior to the date of this account, the defendant had dealt to a very limited extent

with the plaintiffs; that early in December, 1881, he sent the following letter to the plaintiffs:

"FAIRBURY, NEBR., Dec., 1881.

"A. F. SHAPLEIGH AND CANTWELL CO., ST. LOUIS, MO.:

"MESSRS.—Enclosed please find P. O. order of \$3.00, as balance, etc., on my account of Oct. 7th, 1881,

"And oblige

"C. E. DUTCHER."

A receipt was given by the plaintiffs as follows:

"ST. LOUIS, 12-5-1881.

"MR. C. E. DUTCHER, FAIRBURY, NEB.

"DEAR SIR—Your favor of 12, enclosing three hundred dollars is received, and the amount placed to your credit. Thanking you for the same, and soliciting your further orders, we are

"Yours Respectfully,

"A. F. SHAPLEIGH AND CANTWELL HARDWARE CO.

"Per HENDRICK, Cashier."

The defendants claim that their cashier made a mistake in stating the amount received, and that the money order for \$3.00 was the only sum sent by the defendant. The testimony of the defendant is that about the 1st of Dec., 1881, he sent the defendants a draft for \$300, and received the above receipt, but that he did not receive a receipt for the \$3.00; that the money order and draft were sent on the same day, the money order in the morning, and the draft in the afternoon; that he could not tell on what bank the draft was drawn, nor its number, or date; that he received it from his brother in the spring of 1880; that he did not know from whom his brother received it, and that his brother was now dead, etc.

The testimony of Hendricks, the cashier of the plaintiff, was taken, in which he denies the receipt of the draft mentioned, and states that the only sum received was \$3.00 in the money order above named. The testimony of Alfred

Williams v. Bates.

Lee, the secretary and treasurer of the company, was also taken, and he states that he has been secretary and treasurer of the firm during its entire existence, and had a general superintendence of all correspondence relating to money matters or to the books, etc., and that neither the books nor correspondence showed the receipt from the defendant of \$300. And the defendant fails to explain why he kept this draft from the spring of 1880 to December, 1881, and should then have sent it to a firm of strangers, to whom he did not owe a dollar, without any directions as to what was to be done with the proceeds. A clear preponderance of the testimony shows that the plaintiff's cashier made a mistake in the receipt, and that the actual amount received was but \$3.00. The verdict is not sustained by sufficient evidence, and the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

HIRAM WILLIAMS, PLAINTIFF IN ERROR, V. WALTER
BATES, DEFENDANT IN ERROR.

Deceit: PROMISSORY NOTE: SALE: CONSIDERATION. One B. having a note of D. in his possession, which he had paid in full out of funds of D., in his hands, afterwards sold the note to W., representing it to be a valid and subsisting obligation against D., and that D. resided near F. in this state, all of which was untrue. *Held*, That W. could recover the consideration paid to B. for the note.

ERROR to the district court for Jefferson county. Tried below before MORRIS, J.

Boyle & Lindley, for plaintiff in error, cited: *Pasley v. Freeman*, 2 Smith's Leading Cases, 55. *Upton v. Vail*,

6 Johns., 181. 3 Wait's Actions and Defenses, 452. *Wilson v. Foree*, 6 Johns., 110.

W. H. Snell, for defendant in error, cited: *Ellis v. Andrews*, 56 N. Y., 83. *Crown v. Brown*, 30 Vt., 707.

MAXWELL, J.

This action was commenced in the county court of Jefferson county to recover the sum of \$85.00 and costs. The defendant demurred to the bill of particulars, the demurrer was sustained and the action dismissed. The district court affirmed the judgment of the county court.

This being a case where a justice of the peace has cognizance neither the statute nor the practice in justice's courts authorize a demurrer to a bill of particulars. This objection, however, was not urged in the brief of either attorney and will not be interposed by the court.

It is alleged in the bill of particulars "that on or about the 18th day of April, 1880, the defendant purchased of the plaintiff certain real estate, and in part payment thereof sold to the plaintiff a promissory note for \$82, given by one E. W. Davis to B. S. Barker or bearer; that the defendant represented that said note was good and valuable and worth its face, and that Davis, the maker thereof, resided near Fairbury, Nebraska, and the defendant "knew of no reason why the note should not be promptly paid when due"; that at the time of making these representations the defendant well knew that said note had been paid and the security released, and that said note was worthless for the reason that Davis, the maker thereof, had fully paid the same to the defendant. There is also an allegation that the defendant had assumed the payment of the note, and had with funds received from Davis paid the same in full. It is alleged that Davis is not a resident of the state, and that said note has not been paid to the plaintiff.

In *Pasley v. Freeman*, 3 T. R., 51, it was held that a false affirmation made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action of deceit. This case was cited with approval in *Upton v. Vail*, 6 Johns., 181, where it is said that case [*Pasley v. Freeman*] went not upon any new ground, but upon the application of a principle of natural justice, long recognized in the law, that fraud or deceit, accompanied with damage, is a good cause of action. See also cases cited in Smith's L. C. (6th ed.), 176-186. The rule is well settled that a false affirmation as to existing facts made by a party with intent to defraud another, and by which he is defrauded is actionable. Now if the allegations of the petition are true, the defendant who had assumed the payment of a note, and had paid the same out of funds of the maker in his hands, sold such note to the plaintiff, at the same time representing that it was a valid and subsisting obligation and that he had no reason to doubt that it would be paid when due, and that the maker was a resident of this state. Whatever the rights of the plaintiff may be as against the maker of the note, which we need not now determine, the defendant knew that his representations in regard to the note and by which the plaintiff was induced to purchase the same, were false, and that the note had been paid in full. This being so the defendant had no right to sell and transfer it to the plaintiff, and as the plaintiff is alleged to have sustained injury thereby he may recover against the defendant. The judgment of the district court and also of the county court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

THE STATE OF NEBRASKA, EX REL. ADNA H. BOWEN,
V. ADAMS COUNTY.

Bonds for Steam Grist Mill Invalid. There is no statute in this state authorizing the voting of aid to steam grist mills, and bonds voted for that purpose are invalid.

MAXWELL, J.

This is an original application for a mandamus to compel the county commissioners of Adams county to levy a tax to pay the interest on a certain bond for the sum of \$500, issued by them for Juniata precinct in Adams county. It appears from the application that in the year 1872 the county commissioners of Adams county submitted to the electors of Juniata precinct the question of issuing the bonds of the precinct to the amount of \$6,000, to aid in the construction of a public steam grist mill. The proposition was adopted, the bonds issued, the mill erected, and, so far as appears, the parties operating the same have fully complied with the terms of the proposition. The only question for determination therefore is, whether a steam grist mill is a work of internal improvement within the meaning of the statute.

In *Traver v. Merrick County*, 14 Neb., 327, it was held that a water grist mill erected for public use, the rates of toll to be determined by the county commissioners, and being subject to regulation by the legislature, was a work of internal improvement within the meaning of the act of 1869, and that bonds voted to aid in its construction were valid. The decision in that case is based almost entirely upon the statute authorizing the condemnation of private property for the purpose of erecting dams and overflowing lands in order to obtain power to propel mills, and upon the decisions of this court in *Nosser v. Seeley*, 10 Neb., 460, and *Seeley v. Bridges*, 13 Id., 547.

In *Traver v. Merrick County*, it is said (page 334): "There is a clear distinction between aiding the development of the water power of the state—a power which is continuing in its nature, and may be used without cost or expense, and must be used at certain points on a stream where a dam can be erected and power obtained—and a mill propelled by steam that must be attended with a continuous cost for fuel, and may at any time be removed to another locality." But for the provisions of the statute authorizing the exercise of the power of eminent domain in behalf of water mills, and thereby placing their regulation under legislative control, they would not be held to be works of internal improvement. It is true that many benefits flow to a community from the erection of a steam grist mill in their midst. But the same may be said of any other manufacturing establishment. It is not every work that is beneficial to the public that is a work of internal improvement within the meaning of the statute. The writ must therefore be denied. By the court,

WRIT DENIED.

John H. Ames and *A. H. Bowen*, for the relator.

O. B. Hewett, for the respondent.

SELDEN N. MERRIAM, PLAINTIFF IN ERROR, v. S. H. CALHOUN AND J. H. CROXTON, DEFENDANTS IN ERROR.

Principal and Agent. Where an agent is clothed with ample powers to buy and sell real estate, institute and defend suits in the name of his principal, actual notice to him in relation to the subject matter of the agency is actual notice to the principal, and is a valid defense on a motion to set aside a judgment rendered by default canceling a tax deed.

ERROR to the district court for Otoe county. Tried below before POUND, J.

Watson & Wodehouse, for plaintiff in error, cited: *Kepley v. Irwin*, 14 Neb., 300.

S. H. Calhoun, for defendants in error, cited: *Newlove v. Woodward*, 9 Neb., 504.

MAXWELL, J.

In January, 1882, the defendants in error commenced an action against the plaintiff in error in the district court of Otoe county to redeem certain lands claimed by them, which had been sold to the plaintiff in error for taxes and a tax deed obtained. The plaintiff in error being a non-resident of the state service was had upon him by publication. At the April term, 1883, of the district court of that county, a decree was rendered by default, in which the court finds that the tax deed is invalid and that the amount of taxes due, with interest at twelve per cent, was the sum of \$552.40, which the defendants in error were required to pay to the clerk of the court, and thereupon the tax deed was set aside. In July, 1883, the plaintiff in error filed an answer to the petition and filed a motion upon proper notice to set aside the default and be let in to defend. The motion was overruled by the court, and the cause is brought to this court by petition in error.

Sec. 82 of the code provides that "a party against whom a judgment or order has been rendered without other service than by publication in a newspaper, may, at any time within five years after the date of the judgment or order, have the same opened and be let in to defend; before the judgment or order shall be opened, the applicant shall give notice to the adverse party of his intention to make such application, and shall file a full answer to the petition, pay

all costs, if the court require them to be paid, and make it appear to the satisfaction of the court by affidavit that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense.

* * * The adverse party, on the hearing of an application to open a judgment or order as provided by this section, shall be allowed to present counter affidavits to show that during the pendency of the action the applicant had notice thereof in time to appear in court and make his defense."

The record contains an affidavit of the defendant, wherein he states that he had no actual notice of the pendency of the action. To show that the defendant had actual notice of the pendency of the action, the plaintiffs introduced in evidence a power of attorney from Selden N. Merriam and wife to W. D. Merriam, by which he is constituted their "true and lawful attorney for us and in our names, places, and steads to bargain and sell any and all real estate that we now own or may hereafter own in the state of Nebraska," etc.

They also introduced affidavits showing that W. D. Merriam was a son of Selden N. Merriam, and had the entire control of his business in this state; that W. D. Merriam had actual notice of the pendency of the action, but said he would not make any appearance therein because he "was afraid if he entered an appearance in said suit it would preclude him from getting from the said Otoe county the difference between the twelve per centum interest that said plaintiffs would have to pay therein and the forty per centum which he claimed the statute would give him on the sale thereof."

The affidavits in the record show beyond question that W. D. Merriam had full and ample powers in the premises; that for years before that time he had employed attorneys in cases in which his father was interested—that in fact he had conducted his father's business that so far as

appears principally related to tax titles in the same manner as if it had been his own. This being so, actual notice to him was actual notice to the defendant. The question is not whether service could lawfully be made on the agent, because service by publication was made on the proper party—the defendant, but whether the defendant, through his agent having charge and control of his real property in this state, had actual notice of the pendency of the action.

This is proved beyond the possibility of dispute. Notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from or is at the time connected with the subject matter of the agency; for upon general principles of public policy it is presumed that the agent has communicated such facts to the principal; and if he has not, still the principal having intrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal. Story on Agency, § 140. Notice to the agent who purchases lands of a trust attaching thereto will charge the principal with notice of such trust. So of an incumbrance or other matter affecting the title to the same. If the defendant should purchase land while an action was pending which might affect the title to the same, and the agent making the purchase had notice of the pendency of such action, the notice of the agent would be notice to the principal, and the same rule will apply in this case. There is no error in the record, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

GEORGE E. TAYLOR AND M. I. LEBLANC, PLAINTIFFS
IN ERROR, V. PATSEY RYAN, DEFENDANT IN ERROR.

15	573
41	63
15	573
52	713

1. **Trespass.** When in an action of trespass *de bonis asportatis* against a constable and one who was plaintiff in an attachment suit wherein the property of the plaintiff in the case at bar, who was a stranger to the attachment suit, was wrongfully seized and sold by the said constable as the property of the defendant in said attachment suit, the said constable and original plaintiff answer jointly admitting the taking but denying the ownership of the plaintiff at bar and alleging ownership in the defendant in the attachment suit, the said original plaintiff, co-defendant at bar, will be held to have adopted the taking by the constable, and to be jointly liable with him.
2. **Impeaching Witness.** A witness may be impeached by bringing other witnesses to swear that his reputation for truth is bad. In this mode of impeachment, however, it is not competent to show what two or three persons only may think or say concerning him, but the inquiry should be confined to the general estimation in which he is held by his neighbors and acquaintances. *Mathewson v. Burr*, 6 Neb., 312.
3. **Trial: EVIDENCE: INSTRUCTION.** On the case set out at length in the opinion, *Held*, That the chattel mortgage and note therein referred to were properly admitted, and the instruction therein referred to properly refused.

ACTION in the district court of Richardson county by Ryan to recover damages arising from the sale of certain property, of which he claimed to be the owner, by Taylor, constable, who had levied on and held it as the property of one Postal, by virtue of an order of attachment issued in a cause wherein LeBlanc was plaintiff and Postal defendant. On the trial before DAVIDSON, J., the defendants asked the court to instruct the jury that if the chattel mortgage referred to in the opinion "was not accompanied by an immediate delivery of the property mortgaged and followed by an actual and continued change of possession thereof, the mortgage would be presumed to be fraudulent,

unless it was made to appear that the same was executed in good faith." This request was refused. Verdict for plaintiff and cause brought up on petition in error.

A. Schoenheit and *E. W. Thomas*, for plaintiffs in error, cited: *Cooley on Torts*, 468. *Hyde v. Cooper*, 26 Vermont, 552. *Wallis v. White*, 15 N. W. R., 767. 1 Greenleaf Ev., § 461.

John Gagnon and *C. Gillespie*, for defendant in error, cited: *Perrin v. Claflin*, 11 Mo., 13. *Lampsin v. Brander*, 11 N. W. R., 95. 1 Greenleaf Ev., § 461. *Mathewson v. Burr*, 6 Neb., 312. *Starkie on Evidence*, 210. *Jackson v. Campbell*, 5 Wend., 572. *Sherman v. Crosby*, 11 Johns., 70. *Derby v. Weyrich*, 8 Neb., 177. *Noble v. Himeo*, 12 Id., 196. *Zunkle v. Cunningham*, 10 Neb., 164.

COBB, CH. J.

The sixth and seventh grounds of error as set out in the petition in error are made the foundation of the first points in their brief, and we will consider them in that order.

6. Because there was no evidence tending to connect defendant LeBlanc with any wrongful act that may have been done by defendant Taylor, and there was no evidence tending to prove that LeBlanc aided, abetted, or advised the constable Taylor to seize or sell the property in controversy.

7. Because there was no evidence as shown by the bill of exceptions to sustain a verdict against defendant LeBlanc, and the verdict should have been set aside as to him.

The plaintiff in his petition charges that the defendant Taylor was at the time, when, etc., a constable; that the defendant LeBlanc sued out an order of attachment in a certain action in the county court of Richardson county, wherein said LeBlanc was plaintiff and one George Postal was defendant, which order of attachment was placed in

the hands of said Taylor as constable, and that by virtue of said order of attachment the said constable levied upon and attached the property of the plaintiff; that he notified the defendants severally that the said property was his, etc., and demanded that the same be released from said attachment and returned to him, "which defendant Taylor, with the advice and by the order of defendant LeBlanc, refused;" that on or about the 30th day of December, 1880, the defendant LeBlanc applied for and obtained from the said county court an order for the sale of said property as the property of said George Postal, and the said defendant sold said property on the said order and appropriated the proceeds thereof. The answer of the defendants is joint. They admit the taking by defendant Taylor and the sale of the goods by him under the order of sale as the property of George Postal, and allege that it was the property of said Postal. Upon this defense they went to trial, and the jury found in favor of the plaintiff. The evidence in the case is not quite as satisfactory as might be desired. But are we not to presume that the evidence on the part of the plaintiff was confined to the ownership of the property, for the reason that he considered that to be the only material fact put in issue by the pleadings, and had he not a right to so consider?

In the case of *Perrin v. Claflin*, 11 Mo., 13, the court held that "where the goods of one are seized under an attachment against another, on an interpleader filed by the owner of the goods so taken, if the plaintiff in the attachment defend the interpleader, it will be evidence of his assent to the seizure by the officer, and such subsequent assent will render the plaintiff liable in trespass." Under our practice the owner of the property wrongfully taken on an attachment against another could not recover his property or the value of it by means of an interpleader, but is obliged to sue in replevin or trespass; yet the principle is the same, and I think that the answer of LeBlanc jointly with

Taylor, denying property in the plaintiff and alleging property in Postal, is equivalent to defending an interpleader under the Missouri practice. If the defendant LeBlanc did not take the property or authorize or ratify its taking by the officer Taylor, what difference does it make to him whether it was the property of the plaintiff or not?

In the case of *Hyde v. Cooper*, 26 Vt., 552, cited by plaintiff in error, the court in the opinion by C. J. Redfield say: "As a general rule, perhaps, where the mistake is one of fact, and such as makes the officer a trespasser, and the party knowing all the facts consents to take the avails of a sale, or where he counsels the very act which creates the liability of the officer, he is implicated to the same extent as the officer. But where the party does not direct or control the course of the officer, but requires him to proceed at his peril, and the officer makes a mistake of law in judging of his official duty, whereby he becomes a trespasser even by relation, the party is not affected by it, even when he receives the money which is the result of such irregularity, although he was aware of the course pursued by the officer. He is not liable unless he consents to the officer's course, or subsequently adopts it." Now the mistake or irregularity which made the officer a trespasser in the case at bar, was the seizing and selling of the property in question. Does not the party adopt "the officer's course" when he comes into court and joins that officer in an answer averring the same to be the property of the defendant in the attachment and order of sale sued out by the said party and for his use and benefit? I think he does.

The next point made in the brief is, that the court erred in sustaining the motion of the plaintiff below to suppress certain portions of the deposition of a certain witness by whom it was sought to impeach the plaintiff.

The questions and answers suppressed are as follows:

Int. Do you know what his reputation is in the community where you know him, for truth and veracity?

A. It is a little bad from what I have heard men say that had him employed.

Int. Have you been acquainted with his general reputation for truth and veracity during that time?

A. I have.

Int. You may state what that reputation is.

A. It is not very good.

Int. You may state what his general character has been during this time, if you know.

A. From what I have heard I should not think it would be very good.

Int. Give us a reason if you can why you say his character is not very good.

A. Mr. Henthorn run the Senate saloon last winter. He told me that Pat was a d—d thief; Pat had been in his employ in the saloon during the winter. After he quit Henthorn, Pat ran the saloon for Slaughter. After he had been working for him some time, Slaughter told him he had no more use for him. He paid him what he owed him, and Mr. Slaughter says: Pat you stole so much money from me—witness says I have forgotten the amount—and I want it. I want you to give it back, and Pat handed it right over to him.

In the case of *Matthewson v. Burr*, 6 Neb., 312, this court, in the opinion by C. J. LAKE, say: "In this mode of impeachment it is not competent to show what two or three persons say concerning the witness, but the inquiry must be confined to the general estimation in which he is held by his neighbors and acquaintances. Nothing short of this will answer." Under the rule thus correctly stated the testimony was properly suppressed. I will add that the impeachment of witnesses by the testimony of other witnesses as to character is not greatly favored in the law; and if a party pursuing it should not in all cases be held strictly and technically to the rule of evidence in such cases, he should be held to the spirit of it.

The third point is, that the court erred in admitting the chattel mortgage and note from George Postal to John Postal in evidence. The objection made to the reception of the mortgage in evidence was in the following words: "It does not show that this mortgage is valid in the state of Missouri, or that it was a lien on the property; there is no sign of its being recorded; it is immaterial and irrelevant."

There was no error in the reception of this mortgage. The deposition of George Postal had been read in evidence, in which he testified as follows:

Q. State how the plaintiff became the owner of said furniture. (This being the furniture which according to all the testimony had been traded to C. C. Davis for the horses, harness, and saddle involved in the suit.)

A. I sold it to him. There was a mortgage upon it, and I owed Patsey for labor and borrowed money. He released the mortgage and my indebtedness to him for labor and money borrowed, and paid the difference between said indebtedness and the value of the furniture.

The plaintiff himself had been upon the stand, and had testified that the horses, etc., taken on the execution, belonged to him; that he traded certain goods and furniture, constituting a hotel outfit for it, to Lum Davis; and in reply to the question, What did you pay Postal for the hotel property? he stated the facts substantially as they had been stated by Postal in his deposition. He had already stated that at the time he traded the hotel furniture to Davis for the horses, etc., he had the said hotel furniture in his possession—that he had had it for six weeks or two months; that he got it from George Postal. All of the evidence in the case on either side is agreed that the horses, etc., had originally belonged to C. C. Davis, of Rulo, and that he had traded them for the said hotel furniture, and that the said trade was in point of fact made by Davis with the plaintiff; but the contention on the part of defendants was

Zahradnicek v. Selby.

that in making said trade the plaintiff was in reality acting for Postal. Such being the case, I think that the mortgage was material, and its introduction necessary to a proper understanding of the case by the jury. The mortgaged property being in the actual and exclusive possession of the plaintiff at the time of the trade to Davis, it was unnecessary to prove the *bona fides* of the mortgage. Otherwise it must have been held to be void until proof of its *bona fides* had been made. Accordingly I conclude that there was no error in the refusal of the court to instruct the jury as requested by the defendants in regard to the admission in evidence of the said chattel mortgage and note from G. W. Postal to John Postal, and transferred by the latter to the plaintiff.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JOHN ZAHRADNICEK, APPELLEE, v. W. L. SELBY,
APPELLANT.

15	579
16	161
16	196
16	238
16	297
16	548
20	245
21	83
23	219
15	579
34	196

1. **Taxes:** NOTICE OF SALE. Where taxes levied upon lands in 1879 are delinquent, a notice of the sale of the same for the taxes due thereon must be published in a newspaper as required by the act of 1877.
2. ———: ———: PUBLICATION. Such notice may be in a supplement if the circulation of the same is as extensive as that of the paper itself.
3. ———: REDEMPTION: NOTICE. Notice of the time when the redemption of lands sold at tax sale will expire must be given at least three months prior to the expiration of two years from the date of sale to entitle the party to a tax deed.

APPEAL from the district court of Colfax county. Tried below before Post, J.

Vermilion & Vermilion, for appellant.

E. T. Hodsdon, for appellee.

MAXWELL, J.

Taxes were legally levied upon certain real estate of the plaintiff in Colfax county, in July, 1879. In November, 1880, the land in question was sold for said taxes to one John Doe, who assigned his certificate of purchase to the defendant. On the eleventh day of January, 1883, a notice of the time when it was alleged the redemption would expire was duly given, and on the twelfth day of April, 1883, the defendant obtained a tax deed for said premises. The plaintiff thereupon brought this action to set the deed aside and to redeem. A decree was rendered in the court below setting aside the deed and permitting the plaintiff to redeem on payment of the taxes due and 12 per cent interest thereon. The defendant appeals to this court.

Two questions presented by the record are: *First*, Where taxes were levied prior to the time the revenue law of 1879 took effect, is it necessary to advertise the lands to be sold for said taxes in a newspaper, and if so is the law sufficiently complied with if advertised in a supplement of such paper? *Second*, Can such notice be given so as to entitle the tax purchaser to a tax deed after two years from the date of purchase? These questions will be considered in their order.

In *Hamilton County v. Bailey*, 12 Neb., 56, it was held that the revenue law of 1879 does not repeal the act approved February 19th, 1877, so far as it requires a notice of the sale of lands and lots upon which taxes levied prior

to September 1st, 1879, are delinquent, to be published in a newspaper. The question was carefully examined in that case, and we think a proper construction given to the statute. We therefore adhere to that decision. The supplement in this case is shown to have been issued as a part of the paper, and although the matter contained therein related almost entirely to lands and lots advertised for delinquent taxes, we are of the opinion it is sufficient.

In Blackwell on Tax Titles, page 243, it is said: "A publication in extra sheets which are circulated with the paper designated by law, is a legal notice; but when it appears that the extra sheets were not in fact sent to all the subscribers of the paper, the advertisement will be regarded as void. Such was the practice in Illinois from 1823 to 1830, but as the notices were all illegal in other respects, this question was never judicially determined. But there seems to be no plausible objection to a publication in extras, if the circulation of them is as extensive as the newspaper itself in which the notice is required to be published, etc."

The testimony shows that the circulation of the supplement was as extensive as that of the paper itself, and as no objection is made to the form of the notice, the publication was sufficient.

Second. Sec. 119 of the revenue law of 1879 provides that, "the owner, or occupant of any land sold for taxes, or any person having a lien or interest thereon, may redeem the same at any time *within two years after the day of such sale* by paying the county treasurer for the use of such purchaser, his heirs, or assigns, the sum mentioned in his certificate, with interest thereon at the rate of twenty per cent thereon from the date of purchase, etc." Sec. 123 provides that, "Such purchaser, or assignees shall serve or cause to be served, a written, or printed, or partly written and partly printed notice of such purchase on every person in actual possession or occupancy of such land or lot, and

also the person in whose name the same was taxed or specially assessed, if upon diligent inquiry he can be found in the county at least three months before the time of redemption on such sale, in which notice he shall state when he purchased the land or lot, in whose name taxed or specially assessed, and when the time of redemption will expire, etc."

It will be seen that the notice is to be given at least three months before the time of redemption expires—that is, at least three months before the expiration of two years from the date of sale. To entitle a party to a tax deed, all the essential requirements of the statute must be complied with, and if any are omitted the title will fail. Cooley on Taxation, 323-324. As the statute requires the notice to be given at least three months before the time for redemption expires to entitle the purchaser to a deed, there was no authority to give such notice and obtain a deed after the expiration of the time fixed by law to redeem. The remedy of the tax purchaser in such case is to foreclose his tax lien. The deed therefore was invalid, and was properly set aside. The sale, however, and all the proceedings leading up to it, seem to have been in proper form, and the purchaser is entitled to twenty per cent interest up to the expiration of the time to redeem, and ten per cent since that time. The decree of the court below will be modified accordingly. As neither party is free from fault the costs in both courts will be equally divided between them.

JUDGMENT ACCORDINGLY.

THE other judges concur.

WILLIAM G. SMITH, PLAINTIFF IN ERROR, v. THE SIOUX
CITY & PACIFIC RAILROAD COMPANY, DEFENDANT
IN ERROR.

1. **Practice:** DISMISSAL OF ACTION BY THE COURT. After the introduction of the testimony of the plaintiff to a jury impaneled to try the cause, the court has no authority to dismiss a case and discharge the jury without a verdict upon the merits.
2. ———: ———. If the evidence so introduced tends in any degree to sustain the allegations of the plaintiff's petition, the action of the court in summarily dismissing the action will be deemed prejudicial to the plaintiff, and a new trial will be ordered.

ERROR to the district court for Madison county. Tried below before BARNES, J.

Wigton & Whitham and Robertson & Campbell, for plaintiff in error, cited: *Lewis v. Watrus*, 7 Neb., 477. *Byrd v. Blessing* 11 Ohio State, 362. *Stockstill v. Railroad*, 24 Id., 86. *Way v. R. R.*, 35 Iowa, 585. *Ellis v. Ohio*, 4 Ohio State, 646.

Joy, Wright & Hudson, for defendant in error, cited: *B. & M. R. R. Co. v. Wendt*, 12 Neb., 76. *Reynolds v. B. & M. R. R. Co.*, 11 Id., 186. *Manzy v. Hardy*, 13 Id., 36. *Bothwell v. R. R.*, 13 N. W. Rep., 78. *Gilman v. R. R.*, 17 Id., 520.

REESE, J.

This action was brought in the district court of Madison county by the plaintiff in error against the defendant in error for damages resulting to the plaintiff in error from personal injuries received by reason of the negligence of the agent and employe of the defendant in error.

On the trial a jury was impaneled, the plaintiff intro-

15	583
18	606
22	776
15	583
28	121
15	583
36	133
15	583
38	746
15	583
47	148
15	583
54	643

duced his testimony and rested. The defendant thereupon filed a motion to dismiss the cause on the grounds:

1st. That the evidence introduced by plaintiff does not show any negligence on the part of defendant, its servants, agents, or employees.

2d. That the evidence of plaintiff does not show any cause of action against the defendant.

3d. That no negligence has been shown to warrant or authorize any recovery in this action.

This motion was sustained, the cause dismissed, and the jury discharged.

The question presented for decision is, whether the court had the authority to dismiss the cause in this summary way.

Section 430 of the civil code provides that an action may be dismissed without prejudice to a future action, by the court, where the plaintiff fails to appear on the trial, or for want of necessary parties, or on the application of some of the defendants where there are others whom the plaintiff fails to prosecute with diligence, or for disobedience by the plaintiff of an order concerning the proceedings in the action. In all other cases upon the trial of the action the decision must be upon the merits. We know of no other provision of the code authorizing the court to dismiss an action than the one above referred to, and from this it is evident it was not the intention of the legislature to give to the courts any other or greater authority than is reasonably to be inferred from the language used. We are greatly strengthened in this belief by reference to the latter clause of the section, which declares expressly that *in all other cases upon the trial of the action the decision must be upon the merits.*

In sustaining this motion we think the court erred.

After the evidence had been given to the jury by the plaintiff tending to maintain the issue on his part, it was error in the court to dismiss the case and discharge the jury without a verdict. *Byrd v. Blessing*, 11 Ohio State, 362.

The next question arising in the case is, whether or not the error was to the prejudice of the plaintiff. If not, the judgment of the district court will not be reversed.

The action is brought upon the theory that the plaintiff was employed by the defendant and placed under a superior who held to plaintiff the relation of vice-principal. That this superior, although a servant of the defendant, was, so far as this plaintiff was concerned, the employer, authorized to hire and discharge other employes at his own pleasure and to exercise authority over their movements.

The questions growing out of this relation being now before the court in another cause will not be further discussed here.

By an examination of the testimony we think the evidence tended to sustain the plaintiff's theory of the case, and that it should have been submitted to the jury with the proper instructions to guide them in their deliberations. There was some evidence which tended to prove that King, the foreman, through whose negligence the plaintiff claims to have received the injury, stood in the relation of "superior servant" to the plaintiff, that he had control or superior authority over him with respect to the business in which they were employed, that he had authority to employ and discharge men as he saw proper, give direction to their movements and their work. If such were true the plaintiff would be subordinate to King, and King would stand in the place of the defendant, and if the plaintiff, while in that subordinate relation, was injured by the negligence of King, without fault on his, plaintiff's, part, as the testimony tended to prove, the defendant would be liable. *Gravelle v. M. & St. L. Ry. Co.*, 10 Fed. Rep., 711. *Little Miami R. R. Co. v. Stevens*, 20 Ohio, 415. *C. C. & C. R. R. Co. v. Keary*, 3 Ohio State, 203. *Berea Stone Co. v. Kraft*, 31 Ohio State, 287. *Dowling v. Allen*, 74 Mo., 13. *C. St. P., M. & O. R. R. v. Lundstrum*, decided at July term, 1884.

All that the evidence in any degree tends to prove must be received as fully proved for the purpose of ascertaining whether the decision of the court was to the prejudice of the plaintiff, for by the interposition of the motion the defendant admitted not only the truth of the evidence, but the existence of all the facts which the evidence conduces to prove as well as inferences to be drawn from it. The only question is, whether all the material facts alleged in the petition have been supported by *some* evidence, however slight. It matters not how slight this evidence may have been, if *any* was produced the motion should have been overruled, because it is the right of a party to have the weight and sufficiency of his testimony passed upon by the jury.

The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THE other judges concur.

15	586
23	040
15	586
39	443
15	586
41	98
15	586
43	562
15	586
59	021

C. AULTMAN & CO., PLAINTIFF IN ERROR, V. I. M.
STOUT, DEFENDANT IN ERROR.

Contract: BREACH: DAMAGES. When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. *Hoadly v. Bazendale*, 9 Exchq. R., 341.

ERROR to the district court for York county. Tried below before NORVAL, J.

Lamb, Ricketts & Wilson, for plaintiff in error.

Sedgwick & Power, for defendant in error.

COBB, CH. J.

This action was brought in the court below by the plaintiff in error, an incorporated company of the state of Ohio, against the defendant in error on two promissory notes, each for the payment of one hundred and thirty dollars with interest, on which plaintiff claimed that there was due and unpaid at the time of commencing the suit the sum of three hundred and eighty-five dollars.

The defendant by his answer admitted the execution and delivery of the two promissory notes in manner and form as alleged by the plaintiff in its petition; but alleged that at the time of the making and delivery of the said two notes the plaintiff sold and delivered to the defendant one threshing machine and horse power for the agreed price of six hundred and fifty dollars, and that defendant gave plaintiff his five promissory notes for said purchase price, all of said notes being negotiable notes for \$130 each, and defendant also agreed to pay the freight on said machine and horse power; that to induce the defendant to purchase said machine and power, and as part of said contract of sale, the said plaintiff agreed to furnish defendant a good, perfectly constructed threshing machine, made of good material, with a thirty-six inch cylinder, and a twelve-horse power, well constructed, and capable of furnishing sufficient power to run said threshing machine, and also warranted that said machine if properly managed would thresh one thousand bushels of wheat per day; that said defendant relied upon said warranty, etc.; that said machines were not nor either of them as warranted by the said plaintiff as aforesaid, but the machine so furnished by plaintiff was not a thirty inch cylinder, and was of poor material and construction, and was imperfectly and improperly made

and constructed, and would not thresh one thousand bushels of wheat per day if properly arranged, but was absolutely worthless; that the said power so furnished was not a twelve-horse power, was not well constructed and of good material, and was not capable of furnishing sufficient power to run said threshing machine, and was of no value; that two of said notes for \$130 each and interest thereon from the eighth day of September, 1877, negotiable in form, drawn to the order of the plaintiff and delivered to it, are now outstanding, and for which the said defendant is liable; that by reason of the failure of the said plaintiff to keep and perform its said contract and agreement, and by reason of the failure of said warranty and the failure of the said machine and power in the respect warranted the defendant has been damaged in a large amount; that defendant had taken large contracts for threshing, and was unable to fulfill said contracts by reason of the said failure of the said machine and power, and so lost large profits which he otherwise might have made; and that defendant has lost large quantities of grain, being unable to thresh and save the same by reason of the said failure of said machine and power; and that defendant expended a great amount of time and labor by himself and others in his employ in endeavoring to repair said machine and power, and in endeavoring to use the same, etc.

There was a trial to a jury, with a verdict and judgment for defendant for five hundred dollars and costs.

It seems from the testimony as preserved in the bill of exceptions that the machine was sold and delivered to the defendant early in September, 1877. The evidence of warranty is of a very unsatisfactory character. It is impossible to say with any certainty whether the warranty was in writing on the form for orders prepared by the company, or was only verbal by Gandy, the local agent. But there is not a shadow of testimony that Gandy as local agent was authorized to bind the company by warranty.

It seems that from the first the machine failed to give satisfaction, and the defendant complained to the local agent soon after he took the machine to his farm. Defendant states in his testimony that he did not think that the machine would work before he took it home; but upon trying it, the principal difficulty seemed to be with the power—that the power was not sufficient to run the separator.

Afterwards, it seems that one Aiken appeared on the scene, and promised to furnish a new twelve-horse power, and gave the defendant a writing to that effect. Yet defendant continued to run the machine at different places, but, as he says, with poor success during the season of 1877. In 1878, Gandy, the local agent, procured for defendant a new ten-horse power. According to Gandy's testimony, this new power was delivered to the defendant, and at the same time a deduction of fifty dollars was made on the price of the machine and credited on one of the notes, and that said new power and credit of fifty dollars was received by defendant in full of all claim for damages on account of the deficiencies in said machine. And defendant testifies that at the time of receiving said new power he gave up to Gandy the writing which he had received from Aiken. Defendant also testified that upon the receipt of the new power he went to work with it, and threshed for John Darling. In answer to the question, "How did it run?" he answered: "We didn't try to run it very hard because I was afraid of the new power. I just run along with it, and didn't examine it close. I was watching the jar to see if that was all right, and didn't notice the *separator* much. Darling didn't have a very big job, and coming along down to Hutchinson's, I met him with the boxing and oat sieve, and he said, 'Here is the boxing and oat sieve,' and he said, 'Gandy wants that piece of writing on that power;' and I said, 'All right, it is at home,' and I said, 'I am going * * *'" He further testified that the next work he

did with the machine was at Stally's. To the question "How did the machine run there?" he answered, "We could not do anything with it at all. I fixed the box and told Hutchinson about the boxing, and he came out there to see about it, and he said, it was not the boxing, it was the shaft that plays the mischief. * * * This was in the second year, 1878, after I got the new horse power. I said, 'I believe it is a good power if it had a chance to do its work.' The separator all the time was doing beautiful, and I said, 'Tell Gandy to send and get a new shaft made or I will send the separator in. I can't do anything with it. I will worry through this job.'" It seems that after this new shaft was obtained, it was discovered that the difficulty was in the cylinder shaft not being placed in the center of the cylinder. This was discovered by the blacksmith to whom the cylinder was taken for repairs in 1879, and so the defendant abandoned the machine.

The defendant was then permitted, over the objection of plaintiff, to testify as to the number of hands and teams he had in his employ and the amount of wages paid to the hands and for the teams; also the value of his own time and labor and board and board of hands and teams during the whole of the threshing seasons of 1877 and 1878; also, that for a portion of the time he paid six of his neighbors at the rate of one dollar per day and board to look at him try to make the machine work. He also testified that it cost him one dollar a day for oil used on said machine to prevent its taking fire and burning up.

Plaintiff moved to strike out all of the testimony, as to damages sustained by the defendant before the modification of the contract, on the ground that the defendant had alleged in his answer that one of the considerations for the modifying of the agreement was the waiver on his part of all damages sustained by him before that time. Motion overruled.

Plaintiff claims that there was error in the instruction of

the court in the third instruction, given on the court's own motion, in limiting the plaintiff's claim to the face of the notes and interest thereon, and not including the amount stipulated for attorneys' fees. This point is not well taken. In the case of *Rich v. Stretch*, 4 Neb., 187, this court, in the opinion by then CH. J. LAKE, says: "In cases like this, the court is authorized in its discretion to allow such fee (attorneys' fees) not exceeding ten per cent on the amount of recovery; but if such an allowance is made, the record should show the fact, and it should be kept entirely distinct from the judgment proper. It is considered in the nature of costs, and should be treated as such." This case has been followed in *Hendrix v. Rieman*, 6 Id., 516, and *Heard v. Dubuque County Bank*, 8 Id., 10, and will be adhered to.

The fourth instruction given by the court on its own motion is as follows:

"4. After you have found the amount of the notes as above, then determine from the evidence whether the machine was sold under a warranty, as defendant claims. If it was, then determine from the evidence whether such warranty failed. If the warranty was made, and if it failed, then, in order to determine the amount of the defendant's set off, you should find from the evidence the difference in the value of the machine as it actually was as compared with what it would have been worth if it had been as represented.

"This difference in value, together with a reasonable compensation for loss of time both by the defendant and by his hired help and horses caused by such defect, together with his actual and necessary expenses in trying to cure the defect, would give the amount that the defendant Stout could set off against the notes."

No objection can be taken to this instruction, except to the last clause; that, I think, is erroneous as applied to the evidence in this case, in not fixing a limit to the time and

money which the defendant could devote at the expense of the plaintiff in experimenting with the machine after the same proved defective in its operation.

Testimony had been admitted tending to prove the loss of two threshing seasons' time by four men and ten horses, regular hands, to say nothing of the six neighbors watching and waiting for ten days at a time, and the use of a dollar's worth of oil on the machine each day for 96 days; and by this instruction the jury is told by the court to allow the defendant a reasonable compensation for all this as a claim against the plaintiff. This I think was erroneous. The defendant would no doubt be entitled to compensation for his time and expenses in the setting up and testing the machine up to the time that the machine was put to the test as to whether it came up to the warranty or not; but after it proved to be defective, he could no longer experiment with it at the vendor's expense. Defendant, in his brief, claims that this experimenting was, to some extent at least, chargeable to encouragement held out by the agents of the plaintiff; but in point of fact, there is no proof of agency that would bind the plaintiff to anything done or said by Gandy or Aiken in respect to the machine after the giving of the notes; and indeed, the only proof of agency on the part of the defendant is that which arises by way of estoppel from the fact of the possession of the notes as payee by the plaintiff. We have often had occasion to refer to the case of *Hadley v. Bazendale*, 9 Excheq. R., 341, as the leading case on the point controlling this one. It is there laid down as the rule, that "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time

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they made the contract, as the probable result of the breach of it."

Applying this principle to the case at bar, it cannot be possible that the labor of four men and teams for two whole seasons and the consumption of ten barrels of machine oil would either naturally arise from the failure of the machine to run as warranted or that it was within the contemplation of the parties at the time they made the contract.

It is impossible to read the record in this case and escape the conviction that the case was not properly presented to the jury and that the damages found by them were excessive.

The judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

THE other judges concur.

HENRY BARTLETT, PLAINTIFF AND APPELLEE, V. EDWARD BARTLETT AND OTHERS, DEFENDANTS AND APPELLANTS.

1. **Witness: INCOMPETENCY MAY BE WAIVED.** While a party to an action is an incompetent witness when the adverse party is the representative of a deceased person, yet the benefit of the statute may be waived by the party for whose benefit the statute is made, and the witness then becomes competent to testify.
2. **—: PRESUMPTION.** When the testimony of an incompetent witness is certified to this court the same as any other witness who testified on the trial, and the record shows no objection made on the trial to the testimony of the witness, the presumption follows that the objection was waived.
3. **Equity Title to Real Property: HUSBAND AND WIFE.** When the husband causes his real estate to be conveyed to his

15	598
34	278
15	598
36	729

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wife with the understanding between them, definitely stated, that she will hold the title for him and convey the property to anyone to whom he may sell, or in case he does not sell then to him, a court of equity will enforce the trust upon the death of the wife and compel her heirs to execute it.

REHEARING of case reported 13 Neb., 456.

O. H. Scott and A. R. Scott, for appellants.

Colby & Hazlett (O. P. Mason with them), for appellee.

REESE, J.

This cause was decided at the July term, 1882, of this court, and may be found reported at page 456 of the 13th Neb. Reports. After that decision was announced, a motion for a rehearing was made and sustained and a reargument ordered. The cause was reargued and submitted on the twenty-sixth day of July, 1883, and upon a review of the case the then chief justice, LAKE, and Judge MAXWELL adopted the view which was against the decision on the former hearing. The present chief justice, COBB, who wrote the opinion as reported in 13 Neb., being unable to agree with the majority, the record was placed in the hands of the then chief justice to write the opinion. Probably from a want of sufficient time in which to do so, the record was returned with the opinion unwritten. Chief Justice COBB and Judge MAXWELL being still unable to agree, it devolves upon the writer to examine the case, and from the records and briefs alone, unaided by either of the arguments which have been made, decide it.

The only question as to the soundness of that decision is, whether or not the court was laboring under a mistake as to the facts of the case as shown by the testimony introduced on the trial.

As to the statements of the law contained in that decision and the opinion of the court, we have only to say that

we fully agree with them and have no disposition here to question them.

Starting out then with the presumption of a resulting trust, rebutted by the relation existing between the plaintiff and the deceased, his wife, our whole inquiry will be directed toward the proper solution of the question, Does the proof overcome the presumption that the conveyances were intended as an advancement to her?

It is conceded that if objection is made at the proper time the plaintiff was an incompetent witness under the provisions of the law in force at the time of the trial. But that question is not before us. The benefit of the statute can be waived, and in that event the witness becomes competent. The deposition of the plaintiff appears in this record. It is included in the bill of exceptions the same as the testimony of all the other witnesses, and is certified to by the judge who heard the cause. The bill was served upon the appellee, and no amendments are suggested. It was prepared, evidently, under the direction of the appellant, and there is no record of any objection being made to it on the trial, and the appellants quote from it in their brief. The presumption must be that objection to it was waived and that it was read on the trial.

No testimony was introduced on the trial by any of the defendants, the cause being submitted upon the evidence introduced by the plaintiff. While we have given this testimony a careful and critical examination, yet we shall state the conclusions drawn therefrom by us rather than to any great extent quote the testimony of the witnesses.

The plaintiff and the deceased had been married about twenty-eight years. At the time of their marriage the plaintiff had some means. The deceased had none. Their property was acquired by the joint labors of both, the deceased never having received anything excepting from her husband, the plaintiff. They acquired property of considerable value, and had no children, and at the time of the

death of the wife of the plaintiff she had neither father, mother, nor child living. If it is shown by the testimony that it was not the intention of either of the parties that the conveyances to the wife were advances to her, but that it was understood by both that she was holding the property in trust for the plaintiff, to be deeded to him or to any other person whom he might direct, at his pleasure, then the presumption in favor of the defense is overcome, and the decree of the district court must stand.

On the trial of the cause the court found, "That the plaintiff, Henry Bartlett, purchased all of the above described real estate for himself, and that the same was paid for by plaintiff out of his own property, and the naked legal title only to the same was placed in Elizabeth Bartlett, deceased, to hold in trust for the use and benefit of the plaintiff, Henry Bartlett."

It is conceded by all, and is unquestionably true, that all the real estate, the title to which was held by Mrs. Bartlett at the time of her death, was purchased by the plaintiff and with his own means. And we think it is just as true that it was the understanding of the deceased during her lifetime that she held the title in trust to be conveyed to any person to whom the plaintiff might sell, or in case he did not sell then to him. One witness, Martha Bartlett, testified that the deceased told her "she was only holding the property for a time, and she should deed it back to Henry Bartlett, the plaintiff, or anyone Mr. Bartlett should sell to." Another one, Mrs. Titus, testified that she was on very familiar relations with the family, and that at one time she was jesting with the deceased about an affliction from which the plaintiff was suffering. The witness says: "I said that if Mr. Bartlett should die it would leave the property in good shape and she would not have to go into court with it. Mrs. Bartlett said it would not make any difference, that if Henry Bartlett should not live why she would not have the trouble to deed it back to him when

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they got settled with Capt. Hill, and I would go right straight and deed it to our Edward, and would live with him. We had another conversation afterwards about some other land which had been deeded to her, and she said she would deed it to him or anyone else that Mr. Bartlett wanted her to. She said she did not want the property in her name, and that she had a great deal rather Mr. Bartlett had deeded it to Edward instead of her, for fear some one would think they were trying to rob some one. While she was sick in bed I went down to see her. She had been sick only a day or two. I asked her how she was, and she said she thought she felt some better, but Mr. Bartlett had gone after a girl. She said she thought she had typhoid fever. She says, if the doctor says it is the typhoid fever I wish you would speak to Henry Bartlett when he gets back, and have him get the property fixed up, as it might cause him some trouble if anything should happen."

These declarations were made by her while she was the holder of the title, in disparagement thereof, and were she living they would be competent evidence against her. They are none the less so now. *Scarven v. Scarven*, 1 N. C. C., 65. *Jeans v. Cook*, 24 Beaver, 518. *Sidmouth v. Sidmouth*, 2 Beav., 447. *Pole v. Pole*, 1 Ves. Sr., 76. *Murless v. Franklin*, 1 Swanst., 13. *Willard v. Willard*, 56 Penn. St., 119.

The plaintiff testified that he caused the lands to be deeded to the deceased to hold just for a time until he got ready to trade them off, as he had done before; that he told her he was going to have some lands deeded to her at two different times, and she said she did not want to be bothered with any lands in her name, and asked him to deed them to his son; that he told her he would not do so, for the reason that the son lived some distance away, and if he traded land he did not want to lose the time by going after him to make the deed. He also testified that he had been somewhat accustomed to have the title to his land held in

her name, and he had had other tracts of land held by her in this way, and that none of them were deeded to her as an advancement, but to hold just for a time until he got ready to trade them off. Also, the persons from whom the lands were purchased testified that they were bought by the plaintiff with his money, and at his request deeded to the deceased; some of them testifying that at the time he procured the deeds to be made to his wife he stated that she would deed it to anyone whom he wished. That it was so understood by both parties is shown by their conduct at the time of the purchase, and by the conduct and declarations of both plaintiff and deceased, and by every circumstance in connection with the matter.

The remaining question requiring attention is, whether or not the plaintiff is in a position to assert his equities in this proceeding, as it is a familiar rule that a person can invoke the aid of a court of equity successfully, only, when he is free from wrong himself. Seizing upon this rule of equity, the defendants insist that the purpose of the plaintiff in procuring the deeds to be made to the deceased was a fraudulent one; that at said time he was indebted to one John E. Hill, and his purpose was to hinder, delay, and defraud the said Hill. On the trial of the cause in the court below, certain questions were propounded to the court by the defendants, touching this branch of the case, which questions and the answers thereto were as follows:

"1st. Does the testimony show that the title to the real estate in controversy was placed in the name of Mrs. Elizabeth Bartlett, deceased, wife of said plaintiff, on account of some financial troubles then existing between said plaintiff and one J. E. Hill?

"Ans. On account of an unsettled partnership account between the parties, but does not show the title was placed in Elizabeth Bartlett to hinder such settlement, nor to defraud, hinder, or delay the said Hill in the collection of his claim."

"2d. Does the testimony show that John E. Hill afterwards obtained a judgment or an award against said plaintiff which grew out of the financial trouble then existing, and if so what was the amount of said judgment or award?

"Ans. Yes, \$1,493.42, and shows the same was paid in full without any attempt to delay said Hill in the collection of said award."

These findings are supported by the testimony, as is also the further fact that at all times during the time the title to these lands were held by the deceased the plaintiff was in the possession of property, held in his own name, of much greater value than would have been required to satisfy the claim of Hill. The plaintiff testifies, and it is not disputed, that Hill was his only creditor, and that he did not know he was indebted to him, and that during the time he owned a stock of furniture valued at \$3,000, and other personal property of the value of \$1,400, and real estate in his own name of the value of \$7,000; and in addition to this the one-third interest in the partnership property, which was in the possession of Hill. It appears that the plaintiff had purchased of Hill one-third interest in a nursery stock, paying him \$850 in cash and executing his note for \$1,450 and paying \$100 on freight. It so turned out that the plaintiff and his partners did not fully agree, when the plaintiff withdrew from any control of the business, leaving everything in the hands of Hill, the business being carried on by him and to a great extent in his own name. During this time the plaintiff was seeking a settlement with his partner, but for some reason, possibly the fault of both, no settlement was made. The plan of procuring these deeds to be made to his wife was adopted by the plaintiff for the purpose of "scaring" Hill into a settlement. Hill testifies that he knew he was perfectly safe and in no danger of losing anything, and the testimony all shows that the greatest publicity practicable was given by the plaintiff to his course and his motives for it.

The settlement was finally made through arbitrators, who gave to the plaintiff one-third of the nursery, and awarded to Hill the sum of \$1,493.42, which the plaintiff soon after paid, to Hill's entire satisfaction.

After a careful examination of the case we fail to find any proof of a fraudulent intent on the part of the plaintiff. That his course was unusual, we concede, but not that it was entirely unreasonable or proof of fraudulent intent. No man ever lost a dollar by it and it was not intended he should. No creditor was ever hindered or delayed one moment in the collection of his claims against the plaintiff, and it was not intended that he should be. Again it is shown that after the satisfaction of the award in Hill's favor, a portion of this property was purchased by the plaintiff and the title taken in the name of his wife. Her own declarations, as well as other proofs, show that the land was not hers and that she was holding it for the plaintiff. His debts were all paid and there was no one to defraud. On just what principle the defendants expect to get this land does not appear.

It is with much hesitation that we have written this opinion overturning the decision of this court in this cause, but prompted by a sense of duty, we could write no other. Our conclusions are reached entirely and alone upon the facts of the case. With the statements of the law contained in the opinion of the court upon the prior hearings we fully agree. Quoting from one of the briefs in this case we can truly say that the record in this case is "wretchedly written and abominably arranged," and it has been difficult to arrive at a conclusion as to what the facts were. But having done so to our satisfaction we must find that the findings and decree of the district court are sustained by sufficient evidence and must be affirmed, which is done.

DECREE AFFIRMED.

MAXWELL, J., concurs.

 Young v. Brand.

JAMES C. YOUNG, PLAINTIFF AND APPELLANT, V. JOSEPH
 BRAND ET AL., DEFENDANTS AND APPELLEES.

15	601
18	130
20	283
20	346
15	601
26	683

1. **Mortgage Foreclosure.** The purchaser under a decree of foreclosure of a mortgage obtains the title of all the parties to the suit whether their title be that which is set forth in the pleadings or not.
2. ———: **COMMISSIONER'S DEED.** The deed of a sheriff or master commissioner under a decree of foreclosure divests the mortgagee of all title to or interest in the land mortgaged to the same extent as if he had executed the deed thereto.
3. ———: **TAX LIEN.** The mortgagee of real estate cannot purchase the mortgaged premises at tax sale prior to the foreclosure by him and after foreclosure take a tax deed and compel the purchaser at foreclosure sale to redeem. The tax lien if foreclosed at all must be foreclosed with the mortgage.

APPEAL from the district court of Otoe county. Heard below before POUND, J.

Watson & Wodehouse, for appellant.

M. L. Hayward, Thomas B. Stevenson, and Edwin J. Murfin, for appellees.

REESE, J.

On the twenty-first day of September, 1871, Hans C. F. Brugman, being the owner of the real estate described in the pleadings in this case, executed a mortgage thereon to Andrew Roos to secure the sum of \$600 due in one year thereafter, and on the third day of June, 1873, he executed another mortgage on the same property to Joseph Brand, the defendant herein, to secure the sum of \$500. On the twenty-sixth day of October, 1877, Roos began his suit in the district court of Otoe county to foreclose his mortgage, making Brugman, Brand, and others parties defendant. On the ninth day of April, 1878, a decree was rendered

foreclosing both mortgages and ordering the real estate to be sold to satisfy the decree, and on the tenth day of September, 1878, an order of sale was issued to the master commissioner directing him to sell the land, which was done on the eighth day of November, 1878, Joseph Brand, the defendant in this action, being the purchaser. The sale was afterwards confirmed by the court, and a deed ordered, which deed was duly executed and delivered on the sixth day of December, 1878.

On the thirteenth day of August, 1877, Roos purchased the real estate at tax sale for the delinquent taxes of 1875, paid the delinquent taxes due thereon for previous years, received a certificate of purchase from the county treasurer of Otoe county, and on the thirteenth day of August, 1876, the county treasurer executed to said Roos a tax deed. On the thirteenth day of December, 1880, Roos, by a quit-claim deed, conveyed said land to the plaintiff, James C. Young, who brings this suit in equity to quiet his title, or if the tax deed should be held invalid then that "he be given and awarded a first lien on the real estate paramount and superior to all claim, interest, or lien of the defendant, that his lien for the taxes so paid be foreclosed, and the land be sold to satisfy the amount found due."

To this petition the defendant answered, denying the title of the plaintiff, and with other defenses pleading in bar of plaintiff's right to recover the foreclosure proceedings. A trial was had in which the plaintiff virtually abandoned his title under the tax deed, and urged his right to recover under that clause of his petition asking the foreclosure of his alleged tax lien. The trial resulted in a general finding and decree in favor of the defendant, and from this decree the plaintiff appeals.

Several questions are presented by the record, but our attention will be confined to one, as from the view taken by us it must be decisive of the case. This question is,

whether or not the foreclosure proceedings in which plaintiff's grantor, Roos, was plaintiff and Brugman was defendant, divested Roos of all title to and liens on the property involved in that action.

In Jones on Mortgages, sec. 1654, referring to the title obtained at a foreclosure sale, it is said the purchaser "obtains the title of all the parties to the suit whether their title be that which is set forth in the bill or not. Whatever the title of the parties to the suit may be, that is what the court undertakes to sell and what the purchaser is entitled to have conveyed to him." Also see *Tallman v. Ely*, 6 Wis., 244. *Shellenbarger v. Biser*, 5 Neb., 195.

This question would seem to be effectually settled by sec. 853 of the civil code. Section 852 directs that the sale of mortgaged premises under a decree of foreclosure shall be made by the sheriff or some other person authorized by the court. Section 853 is as follows: "Deeds shall thereupon be executed by such sheriff, which shall vest in the purchaser the same estate that would have vested in the mortgagee if the equity of redemption had been foreclosed, and no other or greater; and such deed shall be as valid as if executed by the mortgagor and mortgagee, and shall be an entire bar against each of them and all parties to the suit in which the decree for such sale was made, and against their heirs respectively and all persons claiming under such heirs."

In this action the plaintiff is seeking to enforce a lien which was held by his grantor at the time of the commencement and during the pendency of the foreclosure proceedings, and which could have been enforced by him in that action.

The section above quoted provides as definitely as it is possible to express in words that the deed made by the sheriff or other officer, under a decree of foreclosure, "shall be as valid as if executed by the mortgagor and mortgagee, and shall be an entire bar against each of them and all par-

ties to the suit in which the decree for such sale was made," and against their heirs. Roos was the mortgagee and also the plaintiff in that action. Suppose Brugman and Roos had conveyed the real estate in question to the defendant, could it have been claimed that by such conveyance Roos would not have divested himself of the lien which the plaintiff is now seeking to foreclose? We think not. Then if the conveyance made by the officer has the same effect, would it leave him in any better or different position? Certainly not. But the section under consideration provides that the deed shall be a complete bar against him. The transfer of his claim to the plaintiff could convey no greater right than he had. "A stream cannot rise higher than its fountain," and if Roos had no rights under his tax lien surely his assignee can have none.

The foreclosure proceedings were commenced and carried forward to a final decree and sale of the land, the sale confirmed, and deed made. During all this time the plaintiff's grantor held this lien on the mortgaged property, which could have been joined in that action, but no mention is made of it. It is now too late. The deed is an "entire bar" against him, and consequently against those claiming under him. Whatever estate or title Roos had was merged in the decree and extinguished by the deed thereunder.

The finding and decree of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

**SOUTH PLATTE LAND COMPANY, PLAINTIFF IN ERROR,
v. BUFFALO COUNTY, JOSEPH SCOTT, TREASURER,
AND THE CITY OF KEARNEY, DEFENDANTS IN ERROR.**

1. **Town Sites:** PLAT. Under the town site act of 1866, the county commissioners of B. county, upon a proper petition being presented to them for that purpose, incorporated the town of K., to include certain boundaries, *Held*, That their action incorporating the town was not void although certain lands not platted were included.

2. ———: ———: **TAXES.** The town of Kearney was incorporated in 1872, and included in its boundaries sixteen sections of land. It was organized as a city of the second class in December, 1873, and divided into three wards. In 1882 the plaintiff commenced an action to enjoin the city taxes upon its lands adjoining the city proper, and portions of which lands had been sold for city purposes, the sole grounds for the injunction being that the lands in question were not platted at the time of the incorporation of the town. *Held*, That the action could not be maintained.

ERROR to the district court for Buffalo county. Tried below before GASLIN, J.

Marquett, Deweese & Hall, for plaintiff in error.

E. M. Cunningham, for Buffalo County and Scott, Treasurer, and *J. E. Gillespie*, for City of Kearney, defendants in error.

MAXWELL, J.

This is an action to enjoin certain taxes levied by the city of Kearney upon sec. 31, t. 9, r. 15, sec. 11, t. 8, r. 16, sec. 2, t. 8, r. 16, in Buffalo county, it being alleged in the petition that said land is not within the limits of Kearney City. On the trial of the cause in the court below there was a finding and judgment for the defendant. The plaintiff brings the cause to this court by petition in error.

15	606
32	417
32	662
15	606
44	161
15	606
148	560
15	606
51	375

To sustain the action in the court below, the plaintiff, with other evidence, offered the following:

"GIBBON, NEBRASKA, Nov. 30th, 1872.

"Adjourned meeting board of county commissioners. Present, Commissioners McClure, Walsh, and Crowell. Minutes of meeting of Nov. 26th were read and approved. Petition of citizens of Kearney Junction praying to be incorporated into a town to be known as Kearney, to include the following described lands, viz.: Secs. 1, 2, 3, 10, 11, 12, township 8, range 16, and secs. 24, 25, 26, 27, 34, 35, and 36, township 9, range 16 west, and secs. 6 and 7, township 8, range 15, and secs. 30 and 31, township 9, range 15, and also the territory extending southward from the main land in front of said secs. 10, 11, and 12, town 8, range 16, and sec. 7, town 8, range 15, of the same width to channel of the Platte river was received, and on motion agreed to, and the appointment of the following trustees ratified: John Mahon, S. B. March, L. R. More, E. B. Carter, J. H. Chandler." Also an order for the incorporation of the town of Kearney, in which are the following recitals: "And said board being satisfied that said petition was signed by a majority of the taxable inhabitants residing within said limits or boundaries at the date thereof, and it appearing to said board that said inhabitants ought of right to be incorporated into a town with said boundaries, with a police established for their local government, it is therefore ordered that the inhabitants residing within the following limits or boundaries [giving the same descriptions of land as above set forth] are hereby declared to be an incorporated town, and from henceforth they shall be a body politic and corporate by the name and style of the town of Kearney," etc.

It appears from the testimony of Mr. Hamer, a witness called by the plaintiff, that the entire population of Kearney at that time would not exceed three hundred; that about one-half of these persons were residing on section

one, and the others on two adjoining sections. Section one appears to have been platted, and also a portion of an adjoining section, but the remaining sections were vacant or claimed and cultivated largely by persons who were doing business in the town. The town was incorporated under the act of 1866, sec. 1 of which reads as follows: "If a majority of the taxable inhabitants of any town within this territory shall present a petition to the commissioners of the same county in which said town is situated, praying that they may be incorporated, and a police established for their local government, designating the name they wish to assume, and if such commissioners shall be satisfied that a majority of the taxable inhabitants of such town have signed a petition, they may declare the town incorporated, and thenceforth the inhabitants within such bounds shall be a body politic and corporate by the name and style of the town of [naming it], and they and their successors shall be known by that name in law, and have perpetual succession, sue and be sued, defend and be defended in all courts of law and equity, and may grant, purchase, hold, and receive property, both real and personal, within such town, and lease, sell, and dispose of the same for the benefit of the town," etc. Rev. Stat., 379. A new act was passed in 1873, to which it is unnecessary to refer. In December, 1873, the town of Kearney with the above boundaries was organized as a city of the second class and divided into three wards; and such organization has continued to the present time. It appears from the testimony that since the organization of the city all of sections 35 and 36 have been platted into lots; that the high school is situated on section two, and that two tracts of about ten acres each have been sold on that section; and that a portion of section 12 has been sold in lots. Upon this testimony we are asked to cijenjoin the city taxes upon the plaintiff's land. The principal ground upon which relief is sought is, that the act of the commissioners in including land outside of that surveyed

and platted was unauthorized, and section 42 of the act is cited to sustain that position. There is no doubt the owners of land not platted may object to such land being included within the boundaries of the corporation, and in a proper proceeding for that purpose may have it excluded. But if the boundaries of a town are extended over agricultural lands on the petition of the owner, or with his tacit assent, and have included such lands without objection for ten or twelve years, there must be some equitable ground for an injunction, aside from the mere fact that the lands were improperly included in the town site. The petition for incorporation gave the commissioners jurisdiction, and there is no allegation or claim of fraud on their part, and their action cannot be attacked in this collateral manner. We do not decide that the occupants of a town can by petition take in territory in which they have no interest and attach it to a town. But in this case the inhabitants of the town proper seem to have been to a great extent the settlers on the adjoining territory, and to have approved of the enlarged boundaries. The policy of such annexation is not to be commended. The plaintiff made no objection to this annexation, and has received all the benefits to be derived from the same, which, as its lands adjoin the platted and settled portion of the town, must be considerable, and has failed to show any equitable ground for enjoining the taxes named. The judgment must therefore be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

THE STATE OF NEBRASKA, EX REL. W. M. CLINE, v.
JOHN WALLICHS, AUDITOR OF PUBLIC ACCOUNTS.

Appropriations. There can be no implied appropriation of money by the legislature. The auditor has no authority to draw a warrant upon the treasury except in pursuance of a specific appropriation.

MAXWELL, J.

This is an application to compel the auditor to draw his warrant on the temporary school fund for the sum of \$5,583.35, for the premium on county bonds purchased by the board of educational lands and funds. The account has been audited, and the only objection made by the defendant to drawing the warrant in question is, the want of an appropriation. It is claimed on the part of the relator that there is an implied appropriation of sufficient of the temporary school fund for the purpose of paying the premium on bonds purchased by the board.

Sec. 29 of an act to amend an act entitled "An act to provide for the registry, sale, leasing, and general management of all lands and funds set apart for educational purposes, and for the investment of the funds arising from the sale of such lands," approved Feb. 24, 1883 [Laws of 1883, 314], provides that, "the said board shall, at their regular meetings, make the necessary orders for the investment of the principal of the fund derived from the sale of said lands then in the treasury, but none of said funds shall be invested or loaned except on United States or state securities or registered county bonds. *Provided*, The said board at their discretion may, in the purchasing of such bonds, pay from the temporary school fund a premium on high rate of interest bonds. *Provided, however*, The said premium shall not be such as to reduce the investment in such case to a lower rate of interest than six per cent per an-

num." It is claimed that the section quoted makes an appropriation of the necessary amount to pay the premium. But we do not think so. Sec. 22, art. III. of the constitution provides that, "no money shall be drawn from the treasury except in pursuance of a *specific* appropriation made by law." A specific appropriation is one expressly providing funds for a particular purpose. There can be no implied appropriation of money under our constitution, nor any claim audited unless the items of the account are set out. *State v. Wallichs*, 14 Neb., 439. There is also a provision that, "no money shall be diverted from any appropriation made for any purpose." The legislature possesses no power to make an implied appropriation, and there being no express appropriation of the temporary school fund for the purposes named, the auditor had no authority to draw a warrant. The writ must therefore be denied. By the court,

WRIT DENIED.

Charles O. Whedon, for relator.

Isaac Powers, Jr., Attorney General, for respondent.

15	610
16	680
18	488

WALES F. SEVERANCE, PLAINTIFF IN ERROR, V. SAMUEL
M. MELICK ET AL., DEFENDANTS IN ERROR.

1. **Replevin: CHATTEL MORTGAGE.** In an action of replevin between S., plaintiff, and M. and E., defendants, the property was replevied and disposed of, the plaintiff's claim to said property being based on a chattel mortgage thereof executed to him by one C., and the defendants claimed to be the general owners of said chattels, founding their title upon a sale and purchase thereof upon the foreclosure of two chattel mortgages executed by said C. to one F. L. S. prior to the execution of plaintiff, and

Severance v. Melick.

it being the chief point in controversy whether said mortgage to F. L. S. sufficiently described the chattels to make the same notice to a subsequent mortgagee, there being evidence on both sides, it was error on the part of the court to instruct the jury that in case they should find that "the property in controversy *was included* in a mortgage to Frank L. Sheldon, which mortgage was prior in date to that of plaintiff, and that said mortgage to Frank L. Sheldon was also duly filed in the county clerk's office of Lancaster county, * * * and that by virtue of his prior mortgage or mortgages said Sheldon took the property in controversy and foreclosed his said mortgages, and by virtue of said mortgage title sold the property in controversy to the defendants, then your verdict must be in favor of the defendants, and you will assess the value of the property in controversy and damages for taking thereof in accordance therewith; his interest in the property in question will be the amount due on notes secured by said mortgage, if you find plaintiff's mortgage is a valid lien on the property in suit and there was anything due on his note secured thereon, and it is subsequent to Sheldon's mortgage," and the verdict of the jury rendered in accordance with such instruction cannot be upheld.

2. ————— A party to a jury trial has the right to have an instruction prepared by him given to the jury if the same expresses the law correctly as applicable to the issues and evidence in the case, unless the same is either in form or substance contained in some instruction already given, and that without modification or addition thereto by the court.

ERROR to the district court for Lancaster county. Tried below before GASLIN, J., sitting for POUND, J.

Wales F. Severance, pro se.

L. C. Burr, for defendants in error.

CORB, CH. J.

This action was brought in the court below by the plaintiff against the defendants for the possession of certain chattel property. The claim of the plaintiff to the said property was founded on a chattel mortgage executed to him by one Cochran to secure the payment of a promissory note for \$200, interest, and attorney's fees.

It appears from the pleadings that one Frank L. Sheldon had two mortgages executed by the same party, prior in date to the plaintiff's mortgage, upon property of a somewhat similar description; that Sheldon had taken possession of certain property and transferred it to the defendants, from whose possession it was taken on the writ of replevin in this action. And the controversy in this case is as to whether the property described in Sheldon's mortgage or mortgages is the same property described in the plaintiff's mortgage, or rather whether the description of the property as contained in Sheldon's mortgage or mortgages, they being of record, was sufficiently definite and correct as a description of the property replevied to have amounted to notice to the plaintiff at the time of taking his mortgage?

Upon the several questions involved in this inquiry, there was considerable and apparently contradictory testimony; but as the conclusion to which the court has arrived for the disposition of this case does not involve it, and its consideration would occupy more time than I have at my disposal for that purpose, it will not be considered, but it is proper to remark that throughout the trial there seems to have been a lack of control on the part of the court over the attorneys, and a disinclination to interfere with their peculiar method of examining witnesses, which this court could not approve. The case was tried to a jury in the court below, who brought in a verdict of which the following is a copy:

"We, the jury in this case, being duly impaneled and sworn, do find and say that we find the issues joined in favor of the defendants; and do further find that at the commencement of this action defendants had the right of property and special ownership in the goods and chattels in the petition described to the amount of \$144.90, and were entitled to the possession thereof; and we do assess defendants' damages against the plaintiff by reason of the

premises at one dollar; and we further find the value of property in question \$126."

There is a peculiarity about this verdict which can scarcely fail to attract attention. The verdict finds the defendants to possess a special property in the chattels to the amount of \$144.90, when the absolute value thereof is fixed at \$126. This conclusion on the part of the jury could scarcely have been arrived at by them under proper instructions; and we need not look far for the instruction which must have been the cause of this peculiar verdict.

The second instruction given by the court on the part of the defendant reads as follows: "If you shall find from the evidence that the property in controversy was included in a mortgage to Frank L. Sheldon, which mortgage was prior in date to that of plaintiff, and that said mortgage to Frank L. Sheldon was also duly filed in the county clerk's office of Lancaster county according to law at the time of the execution and delivery of the mortgage alleged by plaintiff, and that by virtue of his prior mortgage or mortgages said Sheldon took the property in controversy and foreclosed his said mortgages, and by virtue of his said mortgage title sold the property in controversy to the defendants, then your verdict must be in favor of the defendants, and you will assess the value of the property in controversy and damages for taking thereof in accordance therewith. His interest in the property in question will be the amount due on notes secured by said mortgage, if you find plaintiff's mortgage is a valid lien on the property in suit and there was anything due on his note secured thereby, and it is subsequent to Sheldon's mortgage."

This instruction seems to me not only to ignore the real question in controversy, to-wit, the identity and description of the property in controversy, but also ignores the possibility of the property replevied being less in value than the amount of Sheldon's mortgages. In both respects I consider the instruction erroneous and prejudicial to the

plaintiff in error, as well as necessarily misleading to the jury. The defendants were in no event entitled to a judgment against the plaintiff for more than the value of the property replevied, together with damages for the detention thereof; but it will be seen that the jury gave them by their verdict \$18.90 more than the value of the property as they found it, besides damages for its detention, which they estimated at one dollar.

Were I satisfied with the case in all other respects, we might direct a remittitur for this excess and allow the judgment to stand for the remainder; but I am satisfied that there are many other errors in the record, one of which arises upon the modification by the court of the fifth instruction given at plaintiff's request, which reads as follows: "Without you find that the description of cattle in Sheldon's mortgage was such as would enable persons examining the record to locate and identify the property, aided by such inquiries as the mortgages then suggested, you are instructed that such mortgages as to description are not sufficiently definite to be notice to the subsequent mortgagee in good faith for value." This the court modified by adding the following: "And the same will be applicable to plaintiff's mortgage." This modification was not necessary to explain or limit the meaning of the instruction as requested by the plaintiff; and the giving of it in connection with the instruction was well calculated to mislead the jury in the application of the instruction.

It is a rule of general if not universal acceptance that a party to a case presenting an instruction to the court has the right to have such instruction given to the jury if the same expresses the law correctly as applicable to the issues and evidence in the case, unless the same is either in form or substance contained in some instruction already given, and that without modification or additions thereto by the court. Therefore, without examining the other errors complained of by plaintiff in his petition in error, we

have reached the conclusion that there must be a new trial.

The judgment of the district court is therefore reversed and the case remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

RUTH A. HOLMES, PLAINTIFF IN ERROR, V. CHARLES B.
HOLMES, DEFENDANT IN ERROR.

15	615
57	494

Service by Publication. An affidavit for the service of summons by publication, such as set out in full in the opinion, *Held*, To confer no jurisdiction and to be a nullity.

ERROR to the district court for Dakota county. Heard below before BARNES, J.

Isaac Powers, Jr., for plaintiff in error.

No appearance for defendant in error.

COBB, CH. J.

In this case a divorce was granted at the suit of Charles B. Holmes against Ruth A. Holmes, in the district court of Dakota county. There was no appearance of the said defendant in that court; the service was by publication only. The defendant afterwards filed a motion to set aside the judgment on the ground that the same was null and void, for the reason that the court had no jurisdiction of the case at the time of rendering such judgment, because no summons was served upon the defendant, and that she had no knowledge of the pendency of the action at the time

of rendering judgment, and that the affidavit for publication was void and did not authorize service by publication. The motion was overruled, and upon the alleged error of the court in its overruling the cause is brought to this court on error.

The following is a copy of the affidavit of publication of the summons in this case, taken from the record:

"Charles B. Holmes	}	Aff. for publication.
vs.		
Ruth A. Holmes		

"Now comes said plaintiff, Charles B. Holmes, and being first duly sworn, says that he is now and for the last year and more has been a *bona fide* resident of the state of Nebraska, and that the affiant is now residing in the said county of Dakota.

"That the said defendant is a non-resident of and now absent from the state of Nebraska, and for that reason service of summons cannot be made upon her in Nebraska. That this is one of the cases provided for by the code of Nebraska when service by summons may be had by publication, and affiant desires that service in this case be made upon defendant by publication."

[Signed by the plaintiff and sworn to.]

In the case of *Atkins v. Atkins*, decided by this court and reported in 9th Neb., 191, it was held that an affidavit for service of summons by publication, somewhat similar to the above, was so defective that it gave the court no jurisdiction of the case. It will be observed that the affidavit states no fact as to the cause of action, or otherwise, whereby the court could ascertain whether the said cause was one of those wherein service could be made by publication or not. The affiant swears that it is, to be sure, but he swears to no fact which if proven to be false would form the basis of an indictment for perjury. For this reason, and following the case of *Atkins v. Atkins*, *supra*, the order of the district court in refusing the motion of the defendant to set

Douglas County v. Connell.

aside the decree in this case is reversed, the decree reversed, and the case remanded to the district court for further proceedings in accordance with law.

JUDGMENT ACCORDINGLY.

THE other judges concur.

DOUGLAS COUNTY, APPELLEE, v. WILLIAM J. CONNELL,
APPELLANT.

Equity: SETTING ASIDE JUDGMENT. A suit to set aside or modify a judgment for a cause other than those enumerated in section 602 of the civil code must be founded on some recognized source of equity jurisdiction, such as fraud, accident, or mistake, or the same should be dismissed.

APPEAL from the district court for Douglas county.
Tried below before NEVILLE, J.

W. J. Connell, pro se.

J. C. Cowin, for appellee.

COBB, CH. J.

It seems from the record in this case, that on the 5th day of September, 1878, W. J. Connell commenced his action in the district court of Douglas county against William F. Heins, treasurer of Douglas county, and Thomas Bryant, the object of said action being to enjoin the said treasurer from executing and delivering a tax deed to the said Thomas Bryant of certain land claimed by the said Connell, and which had been sold for delinquent taxes by the said treasurer, and bought by the said Bryant.

A temporary injunction was issued in said case, and on

the 6th day of January, 1879, a final decree was entered therein by the said district court, in which it was, among other things, decreed that it appeared by proper evidence filed in said cause, that the summons in said action had been duly served on both of the said defendants. The said decree granted the relief prayed by the said Connell in his petition, making the said injunction perpetual, and declaring the taxes for which the said land had been sold to be null and void as well as the levy and assessment thereof and all the proceedings connected therewith, and the said Bryant and his assigns barred of all interest therein or equity in or to said land by reason of said certificates, or any payment of taxes thereunder, and which said perpetual injunction was made to apply to the successors of the said William F. Heins, treasurer of Douglas county, as well as to himself.

It further appears that on the 22d day of July, 1879, the board of county commissioners of Douglas county commenced this action in the district court of Douglas county, wherein the said board is plaintiff, and the said William J. Connell, together with William F. Heins, treasurer of Douglas county, and the said Thomas Bryant are defendants. The object and prayer of the petition in which action is that the decree rendered in said first mentioned action be set aside, cancelled, and declared void, and for general relief. That the said Connell and Bryant answered in said action, and on the 7th day of October, 1882, the said district court made its final decree therein, in the following words:

"The court being fully advised in the premises, finds in the case of William J. Connell vs. William F. Heins, treasurer of Douglas county, and Thomas Bryant, heretofore pending in and decided by this court, that the county of Douglas was not made a party defendant, and was not served with summons therein. It is therefore considered adjudged and decreed by this court that the decree rendered

in said cause, so far as the same relates to or may affect or prejudice said county of Douglas, be modified by striking out of the said decree the following words, to-wit: 'And the said taxes, and all thereof are hereby declared null and void, as well also as the pretended levy and assessment thereof and all the proceedings in connection therewith,' and the words, 'As well also as his successors in office,' and that plaintiff recover from said William J. Connell its costs expended herein taxed at \$22.93." There was a motion for new trial, which was overruled, and the case brought to this court by appeal.

If the county of Douglas was not bound by the proceedings in the case of Connell against Heins et al., then it had no cause of action in this case; and I am at a loss to conceive upon what ground it could have been deemed entitled to any relief.

The statute provides that "A district court shall have power to vacate or modify its own judgments or orders after the term at which said judgment was rendered or order made.

1. By granting a new trial of the cause, within the time and in the manner prescribed in section 318.

2. By a new trial granted in proceedings against defendants constructively summoned as provided in sec. 77.

3. For mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order.

4. For fraud practiced by the successful party in obtaining the judgment or order.

5. For erroneous proceedings against an infant, married woman, or person of unsound mind, where the condition of such defendant does not appear in the record or the error in the proceedings.

6. For the death of one party before the judgment in the action.

7. For inevitable casualty or mistake preventing the party from prosecuting or defending.

8. For error in judgment shown by an infant in twelve months after arriving at full age as prescribed in sec. 442.

9. For taking judgment on warrants of attorney for more than was due plaintiff when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment. Section 602 Compiled Statutes, page 611.

The plaintiff's case falls within none of the provisions of this section. There doubtless may cases arise in which a court of equity would have jurisdiction to set aside or modify a judgment in cases other than those mentioned in the above sections; but in all such cases it must be founded upon some recognized source of equity jurisdiction such as fraud, accident, or mistake. Nothing of that kind is alleged in the case at bar. There being no sufficient allegations contained in the petition upon which a judgment could be founded, the judgment of the district court is reversed, and the case dismissed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

WILLIAM ROGGENCAMP, PLAINTIFF IN ERROR, V. JOHN
T. DOBBS, DEFENDANT IN ERROR.

1. **New Trial.** A motion for a new trial must be filed at the term at which the verdict or decision is rendered, and except for newly discovered evidence within three days after the rendition of the verdict or decision, unless unavoidably prevented.
2. ———: **CONSTRUCTION OF STATUTE.** The words "unavoidably prevented" are equivalent in meaning to circumstances beyond the control of the moving party, and do not excuse mere neglect.

ERROR to the district court for Lancaster county. Tried below before POUND, J. Motion to quash bill of exceptions.

15 620
31 244
32 518

15 620
37 701

15 620
41 55

15 620
58 606

15 620
59 62
59 305

L. C. Burr, for defendant in error, for the motion.

H. D. Rhea and Foxworthy & Son, for plaintiff in error, *contra*.

MAXWELL, J.

This is an action of replevin brought by the plaintiff against the defendant to recover certain hogs belonging to the plaintiff, which the defendant as pound master of the village of Bennett had taken up. On the trial of the cause, the jury found for the defendant, and that he had a special interest in the hogs in question for \$10.50. The verdict was rendered on the seventh of June, 1882, and judgment rendered thereon on the twelfth of that month. On the eighteenth, or six days after judgment was rendered, the plaintiff asked leave to file a motion for a new trial. This application was accompanied by affidavits setting forth neglect of the plaintiff's attorney to file the motion, and that the plaintiff placed reliance upon him, etc. A motion for a new trial was also tendered. The application was overruled, and there being no motion for a new trial a motion is now made to quash the bill of exceptions.

Unless equitable grounds exist for granting a new trial, as where a party is prevented from making his defense by circumstances beyond his control, in which case equity may in a proper case grant relief. A motion for a new trial must be filed within the time fixed by law. *Horn v. Queen*, 4 Neb., 108. *Leiby v. Heirs of Ludlow*, 4 Ohio, 493. *Vannerson v. Pendleton*, 8 S. & M., 452. *Peebles v. Ralls*, 1 Little, 24. Unless equitable grounds exist, such as will warrant a court of equity in granting relief, the motion for a new trial must be made at the term the verdict or decision is rendered, and, except for the cause of newly discovered evidence, shall be within three days after the verdict or decision is rendered, unless unavoidably

prevented. Code, § 316. The words "unavoidably prevented" evidently refer to circumstances beyond the control of the party desiring to file the motion. The law requires diligence on the part of clients and attorneys, and the mere neglect of either will not entitle a party to relief on that ground. It might be different in case of the deliberate betrayal of a client by an attorney. But such case probably will not occur, and is not shown in this. There being no sufficient cause shown for filing the motion for a new trial, there was no error in denying the same. As none of the errors assigned in the petition in error can be considered, the judgment of the court below must be affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

WILLIAM OSSENKOP, PLAINTIFF IN ERROR, v. PETER
AKESON, DEFENDANT IN ERROR.

Judgment. An offer in writing, but without a signature, to permit the plaintiff to take judgment for a specified sum and costs is not sufficient. It must be signed.

ERROR to the district court for Cass county. Tried below before POUND, J.

Crites & Ramsay, for plaintiff in error.

George S. Smith and *J. B. Strode*, for defendant in error.

MAXWELL, J.

The defendant brought an action in the county court of Cass county to recover the sum of \$65, with interest from

Ossenkop v. Akeson.

May 1st, 1882. On the trial of the cause the court rendered judgment in favor of Akeson for \$65 and costs. Ossenkop then appealed to the district court, where judgment was rendered against him for the sum of \$14.60. And the court being about to render judgment against him for costs he filed the following affidavit:

"State of Nebraska, }
County of Cass. }

"William Ossenkop, being duly sworn, on oath deposes and says that he is the defendant in the above entitled action; that on the sixth day of June, A.D. 1882, at Mt. Pleasant precinct, in said county, he personally served on said defendant the annexed notice, marked "A," by delivering to and leaving with said defendant a true copy and duplicate thereof, and further affiant saith not.

"WILLIAM OSSENKOP.

"Subscribed in my presence and sworn to before me this nineteenth day of October, 1883.

"W. C. SHOWALTER, *Clerk.*"

"Ex. A.

"To Peter Akeson:

"I hereby offer you judgment against me in the sum of twenty dollars and costs to this time in the action now pending between us before Hon. J. W. Johnson, county judge of Cass county, Nebraska."

There is no signature to the offer, but below the copy in the record are the following words:

"Delivered to Peter Akeson, June 6th, 1882.

"WILLIAM OSSENKOP."

No copy was filed in the county or district courts, nor was the matter brought to the attention of the district court except in the manner above indicated. The district court found that the offer was not sufficient, and rendered judgment against Ossenkop for the costs of the action.

Section 1004 of the code provides that, "if the defend-

ant at any time before trial offer in writing to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor with the costs then accrued. But if he do not accept such offer before the trial, and fail to recover in the action a sum equal to the offer, he cannot recover costs accrued after the offer; but costs must be adjudged against him," etc.

This section is copied literally from sec. 109 of the code of Ohio, and was construed by the supreme court of that state in *Carpenter v. Kent*, 11 Ohio State, 554. In that case the agent of Carpenter, on the return day of the summons, read to the plaintiffs and filed with the justice the following, omitting the title:

"The defendants hereby tender to the plaintiffs a judgment in favor of said plaintiffs against said defendants of fifty dollars, with costs that have accrued up to this date.

"REASON CARPENTER,

"SAMUEL CARPENTER,

"DANIEL BREEDING,

"By JAMES M. STOUT, their agent.

"March 2, 1857."

This was held to be a good tender. See also *Adams v. Phifer*, 25 Ohio State, 301. But we are not aware of any case where it was held that an unsigned notice served upon the plaintiff at his residence was sufficient. The offer should be of such a character, that if the plaintiff saw fit to accept of it, he could file it in court and take judgment for the amount offered. That he could not do so in this case is evident. It does not even appear that the offer was in Ossenkop's handwriting. An offer of this kind, when made, should be filed with the justice, so that in case of an appeal it would be certified up. It cannot be given in evidence, and is merely in the nature of an offer to compromise by paying a certain sum and costs. The offer in the case under consideration would have been sufficient in form if duly signed by the defendant, as it does not appear

Philleo v. Sandwich Mfg. Co.

that any other case between the same parties was pending in the county court. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

EDGAR A. PHILLEO, PLAINTIFF IN ERROR, V. THE SANDWICH MANUFACTURING COMPANY, DEFENDANT IN ERROR.

Verdict not against Evidence. Where the purchaser of a reaper, after having used it an entire season, returned it and brought suit for the purchase money, and the jury having rendered a verdict against him, *Held*, Not against the weight of testimony.

ERROR to the district court for Adams county. Tried below before POUND, J., sitting for GASLIN, J.

J. M. Abbott, for plaintiff in error.

Batty & Ragan, for defendant in error.

MAXWELL, J.

Prior to the harvest of 1881 the plaintiff purchased a reaper of an agent of the defendant. Either through the inexperience of the plaintiff in the use of machinery, or through defects in the machine, or perhaps both, the plaintiff was unable to cut more than five acres per day during that season, about sixty acres in all. In September, 1881, the plaintiff stated to the general agent of the defendant that he had the money in his pocket to pay for the machine, and the agent said he would like to have it "and the company would make the machine all right." The plaintiff states that he thereupon "paid the money and took an

order from White, the general agent, that they would fix it in thirty days." Afterwards the plaintiff took the machine to the station at Mt. Ayr, where he had obtained it, and an agent of the defendant repaired it, excepting the finger bar, which he stated it would be necessary to send to Lincoln for. The plaintiff then took the machine home, but returned it next morning and asked the agent where he would have it. He answered that he would have nothing to do with it.

The agent testifies that a day or two afterwards he took a finger bar out of a new machine and put it in that of the plaintiff; and the testimony tends to show that the machine did good work in the year 1882. The plaintiff, upon returning the machine as above described, commenced a suit against the defendant to recover the amount paid for the machine, and caused an attachment to be issued and levied upon certain machines as the property of the defendant. On the trial of the cause in the district court, the jury returned a verdict for the defendant, and judgment being rendered thereon, the plaintiff brings the cause into this court by petition in error. The principal error relied upon is that the verdict is against the weight of evidence. It is pretty clear that the verdict is right. In the absence of a contract to that effect, a purchaser, after using a machine for an entire season, cannot return it and demand a new one as a matter of right. The company seems to have made the repairs agreed upon, and so far as this record discloses, did all that they agreed to do. In any event, all that the plaintiff could recover would be the value of the repairs; but as the testimony tends to show that they were properly made, there can be no recovery on that ground. There is no error in the record, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

Wilson v. Young.

19-487

ANNIE M. WILSON, PLAINTIFF IN ERROR, V. ORIN E.
YOUNG, DEFENDANT IN ERROR.

15	627
97	157
15	627
58	537

1. **Practice:** PREJUDICIAL ERROR MUST APPEAR. The decision of an inferior court in admitting evidence on the trial of a cause will not be reversed unless the evidence is before the supreme court, and prejudicial error is shown.
2. ———: INSTRUCTIONS TO JURY. In an action of forcible entry and detention or forcible detention of real property, tried in a justice court, the justice has no authority to charge the jury upon the law of the case.

ERROR to the district court for Gage county. Tried below before DAVIDSON, J.

Foxworthy & Son, for plaintiff in error.

Burr & Parsons, for defendant in error.

REESE, J.

On the 11th day of March, 1882, the plaintiff in error instituted proceedings against the defendant in error before A. B. McNickle, a justice of the peace in Gage county, charging him with the forcible detention of the real estate described in her complaint, by holding over after the termination of his lease. The defendant in error answered, denying the unlawful detention of the property, and alleging his right to the possession of the premises under a subsequent lease, made by the plaintiff to him for another year. The case was tried to a jury, who returned a verdict in favor of the defendant. The plaintiff then removed the case to the district court of Gage county by proceedings in error, where the judgment was affirmed, and by similar proceedings she brings it into this court. None of the evidence has been preserved, and we can only look to the record for light in deciding the questions presented.

The record of the justice shows that during the trial

"The usual order of trial was pursued until plaintiff had closed her rebuttal testimony and rested her case, when defendant asked leave of the court to offer some surrebuttal testimony, to which plaintiff objected; objections were not sustained, to which ruling plaintiff then duly excepted."

It is sometimes necessary for courts, in furtherance of justice, to allow testimony to be introduced after a party has closed his case; and in the case of *Tomer v. Densmore*, 8 Neb., 384, this court held that in the exercise of proper discretion such might be permitted after the case had been submitted to the jury. As the evidence introduced as "surrebuttal" is not before us, it is impossible for us to say whether injustice has been done or not, and certainly we cannot presume it has. It is true, the evidence is given a name which does not recommend it, but it is not certain, by any means, that the true character of the testimony is indicated by its name, and it must be presumed that the testimony was properly admitted. It is further alleged that the justice of the peace erred in refusing to give the instruction asked for by the plaintiff. In this there was no error. A justice of the peace has no authority to charge a jury upon the law of a case. *Ives v. Norris*, 13 Neb., 252. The plaintiff in error insists that the decision in the case of *Ives v. Norris* is not applicable to this case for the reason that the system of practice in cases of this kind is different from the practice in ordinary cases, and section 1028 of the civil code is relied upon as indicating the change contended for. While the section referred to changes the oath to be administered to the jury and the form of the verdict, yet we cannot hold that the change is so radical as is contended for by plaintiff.

There being no error shown by the record before us, the decision of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

LOUIS E. EMPKIE ET AL., APPELLEES, V. JOHN MCLEAN
ET AL., APPELLANTS.

15	639
17	665
19	148
15	639
31	120
32	289

1. **Order of Sale:** DEFECTS IN PREVIOUS PROCEEDINGS. The failure of the sheriff to legally advertise and offer for sale property which was not sold for want of bidders will not invalidate a subsequent sale made under another order of sale to which no objection is made.
2. **Bill of Exceptions.** Affidavits used on a hearing in the district court must be embodied in a bill of exceptions to be available in the supreme court.

APPEAL from the district court of Merrick county.
Heard below before POST, J.

W. H. Snelling, for appellants.

A. Ewing and John Patterson, for appellees.

REESE, J.

This case is an appeal from the ruling of the district court of Merrick county in confirming a sale made by the sheriff of certain property on the foreclosure of a mortgage.

It appears from the record that the property had been offered for sale by the sheriff two or three times before it was finally sold, and that on each failure to sell the order of sale had been returned by the sheriff endorsed "Not sold for want of bidders."

The first objection made to the confirmation of the sale, as finally made, is, that at the prior efforts of the sheriff to sell he had advertised and offered the property (which consisted of different tracts of land) as one tract. This may have been true, and yet it is impossible for us to see how it could affect this sale, as it is shown by the sheriff's return that the property was appraised and sold in subdivisions. Whatever may have occurred under the prior

orders of sale in offering the property for sale, since it was not sold, could not in any degree affect the sale made under the last order of sale.

The second objection is, that another party offered to purchase a part of the property at the first offer at a higher price than that for which it sold under the third order of sale. It is not necessary to dwell upon this point longer than to say that, there being no bill of exceptions in this case there is no proof before this court to sustain the allegation. This court cannot consider questions depending upon proofs submitted to the district court unless the evidence is preserved by a proper bill of exceptions. *Ray v. Mason*, 6 Neb., 102. *Oliver v. Sheeley*, 11 Neb., 521.

The same may be said of the other objections presented to the court below, and as the same rule must be applied the judgment and decree of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

15	630
18	283
24	634

15	630
25	380

15	630
24	515

15	630
41	49

JAMES EVANS, PLAINTIFF IN ERROR, V. GEORGE T.
DEROE, DEFENDANT IN ERROR.

1. **Usury.** An usurious note transferred to a *bona fide* purchaser before maturity, for value, without notice, is not open to the defense of usury.
2. **Trial.** Where a jury is waived the finding of a court will not be set aside as being against the weight of evidence, unless it is clearly wrong.

ERROR to the district court for Antelope county. Tried below before BARNES, J.

D. A. Holmes, for plaintiff in error.

Thomas O'Day, for defendant in error.

MAXWELL, J.

In March, 1881, the plaintiff executed a note to W. H. Dickinson for the sum of \$95, due in one year, with interest at ten per cent. A few days after the execution and delivery of the note, Dickinson endorsed it as follows: "Pay Geo. T. DeRoe or order W. H. Dickinson," and sent the same to DeRoe, who resided in New York. Afterwards DeRoe endorsed the note as follows: "Pay to W. H. Dickinson for collection G. T. DeRoe," and sent the note to Dickinson. To secure the payment of this note, the plaintiff executed to Dickinson a chattel mortgage on personal property of the value of several hundred dollars. The plaintiff afterward paid the sum of \$68 on the note. To obtain the balance due thereon the defendant seized the mortgaged property. The plaintiff thereupon brought an action of replevin and regained the possession. On the trial of the cause a jury was waived and a trial had to the court, which found in favor of the defendant, and found the value of his interest to be the sum of \$42.25. The principal error relied upon is, that the finding is against the weight of evidence. The testimony tends to show that the only consideration for the note was the sum of \$60, and it is therefore claimed that the contract is usurious. We think that usury is clearly proved, and if the action was between the original parties to the transaction this court would have no hesitancy in reversing the judgment. But DeRoe claims to be a *bona fide* purchaser of the note for value, before maturity, and without notice of any defense to the same. If this is true he would take the note free from the defense of usury. *Wortendyke v. Meehan*, 9 Neb., 229. The testimony upon this point is conflicting, there being some testimony tending to show that Dickinson was the agent of DeRoe. But the agency is positively de-

nied by witnesses who, if such agency existed, must have known of the same. The endorsement of the note by Dickinson and transmission of the same by him to DeRoe, and the endorsement by DeRoe to Dickinson for collection, are circumstances tending to show an agency, and were proper to submit to a court or jury as tending to establish that fact. But they are not conclusive, and are overcome by other testimony tending to show the good faith of the transaction. It would subserve no good purpose to review the testimony at length. The questions involved are purely of fact, and the finding will not be set aside unless it is clearly wrong. As it is not, the judgment must be affirmed.

JUDGMENT AFFIRMED.

COBB, CH. J., concurs.

REESE, J., having been counsel for defendant in error, did not sit.

15 632
57 410

GEORGE W. FORBES, APPELLANT, v. MARGARET A.
MCCOY ET AL., APPELLEES.

1. **Mortgage to Secure Surety:** WHEN ACTION LIES. Where the condition of a mortgage is to save the mortgagee harmless from the payment of a debt owing by the mortgagor, for which the mortgagee was surety, *Held*, That no action could be maintained on the mortgage until the mortgagee has paid the debt or some portion thereof—that is, until actual damages have been sustained by him.
2. ———: CONSIDERATION. Where a note was signed by the mortgagee as surety, on March 29th, and a mortgage to indemnify him was made by the principal debtor and wife on April 1st following, *Held*, That there is no presumption that there was no consideration for the mortgage.

APPEAL from the district court of Douglas county.
Heard below before NEVILLE, J.

George W. Doane, for appellant.

H. D. Estabrook and J. L. Webster, for appellees.

MAXWELL, J.

This is an action to foreclose a mortgage executed by George A. McCoy and Margaret A. McCoy to the plaintiff upon certain real estate in the city of Omaha. A demurrer to the petition was sustained in the court below and the action dismissed. The plaintiff appeals to this court. It is alleged in the petition, in substance, that on the twenty-ninth day of March, 1870, George A. McCoy, with the plaintiff as surety, executed and delivered to Edward Creighton a promissory note for the sum of \$2,000, due in one year from date, with interest at 12 per cent; that to secure and indemnify the plaintiff from loss on account thereof the said George A. McCoy and Margaret A. McCoy, his wife, on the first day of April, 1870, executed a mortgage to the plaintiff, upon lot 7, in block 22, in the city of Omaha; that on the tenth day of June, 1872, Edward Creighton recovered a judgment against said George A. McCoy and the plaintiff upon said note for the sum of \$2,286 and costs, the plaintiff being certified as surety in said judgment; that on the second of July, 1872, an execution was duly issued on said judgment and levied upon lot 7, in block 22, in Omaha, and the same was sold to William Vorce for the sum of \$1,605, who received a sheriff's deed therefor; that at the time of said sale George A. McCoy owned an undivided half of said lot, and Margaret A. McCoy owned the other undivided half interest therein and dower interest in the other half; that after the sale of said lot there still remained due on said judgment

the sum of \$786.58, and as George A. McCoy had no other property whereon to levy, the plaintiff, to protect his own property from levy and sale, on or about the — day of August, 1872, paid to the sheriff of said county the balance remaining due on said judgment, being the sum of \$786.58, and that thereby the condition of said mortgage was broken and a cause of action accrued in favor of the plaintiff; that no part of said debt has been paid, etc. It is also alleged that George A. McCoy died in 1879, and that no letters of administration have been taken out on his estate. A copy of the mortgage is attached to the petition as an exhibit, and is as follows: "Know all men by these presents, that we, George A. McCoy and Margaret A. McCoy, husband and wife, of Omaha, in consideration of two thousand dollars in hand paid, do hereby grant, bargain, sell, and convey unto George W. Forbes, of the same place, the following described real estate, situate in the county of Douglas, and state of Nebraska, to-wit: Lot 7, in block 22, in the city of Omaha, as surveyed and lithographed, together with all the appurtenances thereunto belonging; and we do hereby covenant with said George W. Forbes and his heirs and assigns that we are lawfully seized of said premises, that they are free from incumbrances, and we do hereby covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever. *Provided always*, and these presents are upon this condition, that whereas George A. McCoy and George W. Forbes have made, executed, and delivered to Edward Creighton a certain promissory note for the sum of \$2,000, dated March 29th, 1870, due one year after date, with interest at the rate of 12 per cent per annum from maturity until paid, which note was signed by said Forbes as an accommodation maker, and this mortgage is to indemnify and save him harmless. Now if the said George A. McCoy shall well and truly pay or cause to be paid the said sum of money in said note mentioned, with the interest thereon,

according to the tenor and effect of said note, then these presents shall be null and void. But if said sum of money or any part thereof or any interest thereon is not paid when the same is due, then in that case the whole of said sum and interest shall and by this indenture does immediately become due and payable; or if the taxes and assessments of every nature which are assessed or levied against said premises are not paid at the time when the same are by law due and payable, then in like manner the whole of said sum shall immediately become due and payable, and upon forfeiture of this mortgage, or in case of default in any of the payments herein provided, the said George W. Forbes shall be entitled to the immediate possession of said premises, and in the event of the foreclosure of this mortgage a reasonable sum, to be determined by the court, shall be awarded in addition to the judgment."

There are three grounds assigned in support of the demurrer: 1st, That the right of entry to the mortgagee is a forfeiture, and a right to foreclose accrues at once; 2d, That when the instrument deviates from a simple contract to indemnify, even though indemnity be the sole object of the contract, upon a breach of the condition a cause of action accrues for the whole amount specified; 3d, That the mortgage being made several days after the giving of the note no consideration is shown. If we consider the several provisions of the mortgage together it is pretty clear that the contract is one of indemnity alone—to save the plaintiff harmless if required to pay the note. This being so, he could sustain no action upon the mortgage until he had sustained injury by paying the debt or a portion of it. This question was before the court in *Gregory v. Hartley*, 6 Neb., 356, and it was held that where a condition or promise is only to indemnify and save harmless a party from some consequence, no action can be maintained until actual damages have been sustained by the plaintiff. *Stout v. Folger*, 34 Iowa, 74. *Lathrop v. Atwood*, 21 Conn.,

117. *In re Negus*, 7 Wend., 499. *Thomas v. Allen*, 1 Hill, 145. *Churchill v. Hunt*, 3 Denio, 321. *Wilson v. Stilwell*, 9 Ohio State, 467. The plaintiff was merely surety on the note. The debt was not his own but that of McCoy.

This principle is clearly recognized in *In re Negus*, 7 Wendell, and *Douglass v. Clark*, 14 John., 177. In the case last cited the condition of the bond was that, "if the said Sylvester Clark above bounden shall well and truly pay off and discharge said bond, and save the said Zebulon harmless and indemnified from the payment thereof or any part thereof, and from all costs, damages, and charges thence arising to said Zebulon, then the above written obligation to be null and void," etc. The court say: "Whether this plea be good or not will depend upon what is deemed the true construction of the bond. If the defendant is to be considered as undertaking to pay off and discharge the recited bond, the plea is bad; but if it be considered a bond of indemnity to save the plaintiff harmless from all damages, by reason of the recited bond, the plea is good. 1 Sand., 117 n. 1 Boss. & Pull., 688. We are inclined to think the good sense and sound interpretation of the bond is according to the latter construction.

* * * This construction is much strengthened by the circumstance that it appears from the recited bond that the defendant was not the person who was to pay the duties. They were due from Rice, with whom the defendant was bound."

In *Thomas v. Allen*, 1 Hill, 145, it is said the bond in suit was more than a bond of indemnity because it bound the defendant to pay off the plaintiff's debt, and the breach was well assigned by alleging that the obligor had not paid at the day. In that case it is said that *Douglass v. Clark* was silently overruled in *Port v. Jackson*, 17 John., 239. The facts in the latter case cannot be stated in a brief form, but it is clear that the obligation was not one of indemnity alone. In the case under consideration, the bond being

Manly v. Downing.

one of indemnity alone, and the plaintiff being merely surety for the payment of the note to Creighton, he sustained no damage for which an action would lie, so far at least as the petition discloses, until he had paid some portion of the debt. And this payment being made within ten years before the commencement of the action, it is not barred by the statute of limitations.

Second. The note was executed on the twenty-ninth of March, 1870, and the mortgage in question on the first of April, of that year. So far as appears, the execution of the mortgage was agreed upon at the time the note was signed. The court will not presume that there was no consideration for the mortgage.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

MYRON G. MANLY, PLAINTIFF IN ERROR, v. ROLLIN L.
DOWNING, DEFENDANT IN ERROR.

1. **Mechanic's Lien.** An account in the following form:
"KEARNEY, NEBRASKA, Feb. 28, 1880.

"N. D. Haley, Esq.,

"To R. L. Downing,

Dr. Cr.

"1879, Sept. 30, to Nov. 13, To lumber for house..\$63 77

"By work \$ 3 00"

Held, To be a sufficient itemization of account under the provisions of sec. 3 of chap. 54, Comp. Stat., entitled "Mechanics' and laborers' liens."

2. ———: **FORECLOSURE.** In an action to foreclose a mechanic's lien, when found necessary the petition may be amended and new parties brought in after the expiration of two years from the time of furnishing the building material or labor on which the lien is founded.

15	637
16	156
15	637
24	366
15	637
37	886
15	637
40	533
15	637
44	510
15	637
54	17

ERROR to the district court for Buffalo county. Tried below before GASLIN, J.

E. C. Calkins, for plaintiff in error, cited: Philips on Mechanics' Liens, § 20.

Sam. L. Savidge, for defendant in error.

COBB, CH. J.

This was an action brought by Rollin L. Downing originally against N. D. Haley for the purpose of foreclosing a mechanic's lien. The petition was verified on the 13th day of October, 1881, and alleged the furnishing and delivery of the building material for which the suit was brought on the 13th day of November, 1879, and the filing of the mechanic's lien in the clerk's office therefor on the 3d day of March, 1880. Service in said action was had on the said Haley by publication, and on the 30th of November, 1881, the default of the said Haley was duly entered in court for want of an answer in said cause. Afterwards on the 5th day of April, 1882, the plaintiff filed in the office of the clerk of said court an amended petition in said cause, in which the said N. D. Haley, and also Myron G. Manly were made defendants; and in which amended petition, after setting up all the facts stated in the original petition, the same contains the following allegations as number six (6): "The defendant, Myron G. Manly, claims to have purchased said premises, after this mechanic's lien attached to the same, and to be now the owner of said premises, but the extent of his interest in the same is unknown to plaintiff. The plaintiff therefore prays for judgment against said N. D. Haley for the sum of sixty dollars and seventy-seven cents with interest thereon from the 11th day of May, 1880. That the lien and interest of the said Myron G. Manly in said premises may be decreed to be

minor and inferior to that of the plaintiff's lien. That defendant may be foreclosed and barred of all right, lien, and equity of redemption in said premises," etc.

On the 22d day of May, 1882, the defendant, Myron G. Manly, filed his answer in said cause, in which he denied all knowledge or information of the furnishing of said building material to the said Haley by the plaintiff. Denies that the said Haley was at the time stated the owner in fee of the said premises. Denies that on the 31st of March, 1880, or at any other time, the plaintiff made an account in writing of the items of lumber or building material furnished defendant Haley under any contract for the erection or repair of any building on said lot, duly sworn to and filed the same in the clerk's office of said Buffalo county. Alleges that on the 9th day of January, 1880, the defendant purchased of defendant Haley his interest in said contract for the said lot, and the same was afterwards and on the same day duly assigned to this defendant. That afterwards, on about the 19th day of May, 1880, the defendant having fulfilled said contract of purchase, received title to the said lot and paid in full an adequate consideration therefor; and that "more than two years have elapsed since the alleged filing of the said alleged account in the said clerk's office of Buffalo county." To this a reply was filed, and a trial had to the court, which found all of the issues in favor of the plaintiff, and rendered a judgment in his favor for sixty-nine dollars and costs, which judgment the defendant Manly now brings to this court by petition in error.

Two points are made: (1) That the statute requires a lienor to file an account of items of his demand. This he failed to do, but simply described it as "balance on lumber" I am not aware that this point has been previously presented to this court, and being cited to no authorities in support of the position taken by plaintiff in error, except the general one, to the effect that in cases between the

claimant and a purchaser in good faith, without notice, the claimant must strictly comply with all the statutory requirements, and seeing no ground whatever upon which plaintiff in error can claim that he has lost any advantage by the failure of the lienor to itemize his account, nor any danger which can possibly be risked of setting an erroneous precedent in this case, I am forced to the conclusion that this point should be overruled.

The first section of the statute entitled "Mechanics' and Laborers' Liens," then in force, provides, "That any persons who shall perform any labor or furnish any material, or machinery, or fixtures," etc. Section three provides that "any person entitled to a lien under this chapter shall make an account in writing of the items of labor, skill, machinery, or material furnished, or either of them, as the case may be," etc.

It is a sufficient compliance with these provisions that the paper signed, sworn to and filed in accordance with the provisions of section three, contains an account in writing, stating the character and time of labor, or the character and value of material or machinery or fixtures as the case may be. I think that to require any further particularity or specifications in this paper would require the doing of an unnecessary thing, and would in some cases work a hardship and loss to meritorious claimants.

The remaining point is that the action was brought out of time; the statute then in force requiring all actions for the enforcement of mechanics' liens to be brought within two years from the furnishing of the material, etc. According to the pleadings and evidence, the building materials in the case were furnished on or about the 13th day of November, 1879. The affidavit for service by publication upon N. D. Haley was sworn to on the 13th day of October, 1881. In the record we find the following journal entry "That due and legal notice of the pendency of this case was given to the said defendant, N. D. Haley, by

publication, as required by law, in the *Western New Era*, a newspaper published in said Buffalo county, and of general circulation therein; and that after the expiration of service, and time of answer to plead or demur to petition of plaintiff, the said Haley was, at the November term, 1881, of this court, three times solemnly called in open court by the sheriff, and came not, but made default, which was accordingly entered of record." This was one of the findings of the court in the case. From these findings it sufficiently appears that the action was commenced against the said Haley within two years from the time of the furnishing of the building materials in question. It is true that after the taking of said judgment by default against the said Haley, the plaintiff discovered that the premises had been conveyed by Haley to the defendant Myron G. Manly, rendering it necessary to make him a party to the proceedings in order to cut off his equity of redemption. The said plaintiff thereupon obtained leave to file an amended petition, which was filed, making the said Myron G. Manly also a defendant, and such proceedings had therein that the judgment which is now before this court on error was rendered. The said defendant Manly also being a non-resident of the state of Nebraska, had to be served by publication, and it is true that the said plaintiff appears to have proceeded against the said Haley as well as the said Manly in these amended proceedings, but so far as the said Haley's name appeared in the second publication, the same was only surplusage, and did not have the effect to set aside and vacate the judgment already rendered against him, nor change the time of the actual commencement of the suit. The action having been commenced against the said Haley within the two years provided by law, the proceedings could be amended and other parties brought in, notwithstanding more than two years had elapsed before proceedings to that end were commenced. There are probably cases holding to the contrary of this,

but we are cited to no authorities on this point, and the time at my disposal does not permit of my hunting them up. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

15	642
21	591
24	250
15	612
31	260
15	642
40	496
15	642
48	46
15	642
50	321
55	656

RANDELL AND REED, PLAINTIFFS IN ERROR, V. ERI C.
PUTNAM, DEFENDANT IN ERROR.

Trial to the Court: FINDING. When an action at law is tried to a court without a jury, the finding of fact by such court is a substitute for, and stands in lieu of, a verdict of a jury, and need be no more specific than the verdict of a jury upon the same pleadings and evidence.

ERROR to the district court for Madison county. Tried below before BARNES, J.

Wigton & Whitham, for plaintiffs in error cited: Gould's Pleadings, § 56. *Uhlig v. Garrison*, 2 N. W. R., 258. *Semple v. Hailman*, 3 Gilm., 131. *Smith v. Silvis*, 8 Neb., 167.

Brome & Durland, for defendent in error, cited: *Degering v. Flick*, 14 Neb., 448. Freeman judgments, §§ 53-55. *Church v. Crossman*, 41 Iowa, 373. *Garret v. Wood*, 3 Kan., 231.

COBB, CH. J..

This case was originally tried before a justice of the peace. The plaintiff's cause of action was stated in his bill of particulars, as follows: "Plaintiff says that defendants Ransdell and Reed are justly indebted to him in the

sum of one hundred and twenty-five dollars on account of work and labor performed by the plaintiff for defendants at their request after the fifteenth day of September, 1881, and before the commencement of this action. Plaintiff further says that the defendants have totally failed and refused to pay him the said sum of money so due for said services, or any part thereof, though often requested, etc.," and demanded judgment for one hundred and twenty-five dollars besides costs.

The defendants filed their counter-claim or set-off in the sum of eighty-one dollars, as follows: "The defendants allege by way of cross demand, that before the bringing of this suit plaintiff was and still is indebted to defendants in the sum of sixty-eight dollars for lodging, fuel, and rent, ten dollars for rent of portions of office for tool chests, and three dollars for money had and received by plaintiff from defendant; wherefore defendants pray judgment for eighty-one dollars and costs."

After hearing the testimony, the justice rendered his judgment as follows: "After hearing and duly weighing the testimony and authorities, it was found by this court that the plaintiff have and recover of the defendants Ransdell and Reed the sum of twenty-nine dollars and fifty cents, as due him for services and labor done and performed, and for costs of this suit, taxed as follows," etc.

The case was taken to the district court on error, where the judgment of the justice was duly affirmed and the said petition in error dismissed; from which judgment the case is brought to this court on error. The points presented by the plaintiffs in error in their brief are as follows:

First, The justice made no finding of facts.

Second, If the justice made a finding of facts such finding is not sufficiently definite and certain.

Third, If there is a finding of fact made such finding is not responsive to all the issues, and the district court erred in affirming such judgment of the justice of the peace.

The finding of facts by a court is in fact a substitute for the verdict of a jury. Had there been a jury in this case, a proper verdict from it would have been: "We, the jury, find for the plaintiff, and assess his damages at twenty-nine dollars and fifty cents." That verdict applied to the claim of the plaintiff and the counter-claim of the defendants would have said, in effect, that the jury found a balance of that amount due to the plaintiff on his account after allowing all that the defendants were entitled to have allowed on their counter-claim or set-off. That, as I understand it, is in effect said by the finding of the justice of the peace in this case. There was really but one issue to be tried by the justice; that was the state of accounts between the plaintiff and defendants as proven at the trial.

The judgment of the district court dismissing the petition in error and affirming the judgment of the justice of the peace is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JORGEN MADSEN, PLAINTIFF IN ERROR, V. NORFOLK
MILL CO., JOHN E. OLNEY, A. J. DURLAND, AND
DANIEL DESMOND, DEFENDANTS IN ERROR.

1. **Bill of Exceptions.** When a bill of exceptions is signed without being submitted to the adverse party for examination and amendment, a motion to quash the same will be sustained.
2. ———: **PRESUMPTION.** There being no bill of exceptions, it will be presumed that the evidence sustains the decree of the district court.

ERROR to the district court for Madison county. Tried below before BARNES, J.

George N. Beels, for plaintiff in error.

Brome & Durland, for defendants in error.

REESE, J.

This is a proceeding in error for the purpose of reversing the judgment of the district court of Madison county. The bill of exceptions was presented to and signed by the trial judge without first having been served upon or submitted to the defendant in error or its attorney. The defendant in error files a motion in this court to quash the bill of exceptions, and the case is submitted upon the motion and generally.

In *Uhling v. Schellenberg*, 12 Neb., 609, this court has decided that where a bill of exceptions was signed without being submitted to the adverse party for examination and amendment, a motion to quash must be sustained. That case is decisive of this. The motion to quash is sustained.

The case being submitted for final decision, we have examined the proceedings so far as is shown by the record, and find no error appearing upon the face thereof. The issues were properly formed and the cause was tried to the court, who found for the defendant. It must be presumed that the finding was supported by sufficient evidence. *White v. Rourke*, 11 Neb., 519. The decree of the district court is affirmed.

DECREE AFFIRMED.

THE other judges concur.

16	646
26	306
15	646
33	273
15a	646
43	567

**WILLIAM B. MILLER, PLAINTIFF IN ERROR, V. TILFORD
M. MESICK, DEFENDANT IN ERROR.**

Bill of Particulars: DEMURRED. There is no provision for a demurrer to a bill of particulars before a justice of the peace.

ERROR to the district court for Kearney county. Tried below before GASLIN, J.

J. M. Stewart, for plaintiff in error.

Joel Hull, for defendant in error.

MAXWELL, J.

This action was brought in the county court of Kearney county upon a promissory note, of which the following is a copy:

"MINDEN, NEB., Oct. 4th, 1880.

"On or before the 4th day of October, 1881, I promise to pay to the order of Hans Miller the sum of \$35, for value received, at ten per cent from date.

"W. B. MILLER."

On which was the following guaranty:

"For value received I guarantee the within to T. M. Mesick.

"HANS MILLER."

The defendant Miller demurred to the bill of particulars upon the ground that the causes of action were improperly joined. The demurrer was sustained. Mesick thereupon took the case on error to the district court, where the judgment was reversed and the cause set down for trial. The plaintiff brings the cause into this court by petition in error.

The same practice would prevail on the trial of this case

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as though it had been tried before a justice of the peace, and there is no provision for a demurrer before a justice. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

BEN MUNDY, APPELLEE, V. CHRISTIANA E. WHITTE-
MORE, APPELLANT.

15	647
17	584
15b	648
24	580
15b	646
54	646

1. **Pleading: EVIDENCE.** Under an allegation in a petition that a note and mortgage were assigned to the plaintiff, he may prove an indorsement and delivery of the note.
2. ———: **MORTGAGE FORECLOSURE.** An allegation in a petition that no proceedings have been had at law for the recovery of the debt secured by the mortgage is sufficient to show that no action at law has been commenced.
3. **Mortgage: HUSBAND AND WIFE: DURESS.** A mortgage executed by a wife upon her separate estate, to secure a debt owing by the husband, for money embezzled by him, is not executed under duress, although done to prevent his being convicted and sent to the penitentiary.
4. ———: **ASSIGNMENT.** The assignee of a mortgage securing a negotiable promissory note, who takes it in good faith before maturity for value, takes it as he does the note free from equities between the original parties.

APPEAL by defendants from a decree of the district court of Lancaster county, POUND, J., presiding.

Samuel J. Tuttle, for appellant, on allegations in petition cited: § 850, Code. *Gregory v. Hartley*, 6 Neb., 356. He also contended that the liability of the appellant in this controversy arises solely from the mortgage, and not at all from the note; for in this mortgage (granting for the

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present that it is valid) she has charged her separate estate with the payment of a certain debt, and the signing of the note does not enlarge the liability; that the appellee in this suit stands therefore at the best, as the assignee of a chose in action only, open to every defense available as against his assignor. 1 Jones on Mortg., 683. Edwards on Bills and Notes, page 286. *McCrum v. Corby*, 11 Kan., 464. *Hadden v. Rodkey*, 17 Kan., 429. And that the burden of proof of showing that appellee was a *bona fide* purchaser without notice devolved on him. *Rock Island Bank v. Nelson*, 41 Iowa, 563. On duress cited: *Tapley v. Tapley*, 10 Minn., 360. *Hackley v. Headley*, 45 Mich., 569. *Central Bank v. Copeland*, 18 Md., 305. *Anderson v. Anderson*, 9 Kan., 112.

M. L. Easterday and *A. S. Tibbets*, for appellee, on *bona fide* purchase by appellee, cited: Comp. Stat., 393. *Porter v. Green*, 4 Iowa, 571. *Hewitt v. Rankin*, 41 Iowa, 35. *Conrad v. Atlantic Ins. Co.*, 1 Peters, 441. Purchaser without knowledge of duress holds the property. *Frey v. Clifford*, 44 Cal., 335. *Deputy v. Stapleford*, 19 Cal., 302. *White v. Graves*, 107 Mass., 325. *Hall v. Patterson*, 51 Pa. St., 289. *Marston v. Brittenham*, 76 Ill., 611. *Somes v. Brewer*, 2 Pick., 184. *Hewitt v. Rankin*, 41 Ia., 35.

MAXWELL, J.

This is an action to foreclose a mortgage executed by Whittemore and wife to F. W. Daubney and by him transferred before due to the plaintiff. The mortgage was executed upon the separate property of the wife, which was occupied as the family homestead. The principal defense relied upon is that the mortgage was executed by the wife while under duress by her husband. It was claimed on the trial of the cause that inasmuch as it is alleged in the petition that the note and mortgage were assigned to the

Mundy v. Whittemore.

plaintiff, that therefore he is not a *bona fide* holder thereof. The allegation is as follows: "On the 14th day of April, 1881, said F. W. Daubney for a valuable consideration assigned said note and mortgage and the money due thereon to this plaintiff." The question here involved was before this court in the case of *State National Bank v. Haylen*, 14 Neb., 480, and it was held that the allegation was sufficient. The word assign means to transfer, or make over. In its broad sense it includes all transfers of whatever nature.

In Jones on Mortgages, Vol. 1, § 834, it is said, "An assignee for value of a negotiable note before due takes it free from equities. At common law, so far as a mortgage is merely a debt or security for a debt, it is a chose in action, not negotiable, and therefore not assignable. * * But the debt, being the principal thing, imparts its character to the mortgage, and although the mortgage itself in the beginning is only assignable in equity, the legal rights and remedies upon the debt have become fixed upon this incident of the debt, and the equitable principles in regard to the mortgage have become naturalized in the common law system. When, therefore, the debt secured is in the form of a negotiable note, a legal transfer thus carries with it the mortgage security; and inasmuch as a negotiable promissory note, by the commercial law, when assigned for value before maturity, passes to the assignee free from all equitable defenses to which it was subject in the hands of the payee, it does not lose this character which it has under the commercial law when it is secured by mortgage. The mortgage rather is regarded as following the note, and as taking the same character; and it is the generally received doctrine that the assignee of a mortgage securing a negotiable note, taking it in good faith before maturity, takes it free from any equities between the original parties."

Under an allegation that an instrument has been assigned to the plaintiff he may introduce proof of any fact tending to show an assignment. The mode in most cases

is not material, so that there was an intention to pass the entire title to the thing assigned. A transfer of negotiable paper by indorsement is but one of the modes by which it may be assigned or transferred. The allegation therefore was sufficient to authorize the introduction of testimony tending to show a transfer of the note and mortgage in question to the plaintiff.

It is alleged in the petition that no proceedings at law have been had for the recovery of the debt secured thereby, nor has any part thereof been collected and paid, and there is now due upon said note and mortgage the sum of \$295.87. At common law a mortgagee could pursue all his remedies at one and the same time. *Booth v. Booth*, 2 Atk., 343. *Burnell v. Martin*, Doug., 417. *Schoole v. Sall*, 1 Sch. & Lef., 186. *Dunkley v. Van Buren*, 3 Johns. Ch., 330. 4 Kent Com., 184. Under that practice a plaintiff could bring his action at law for the recovery of the debt, and having obtained a judgment, cause an execution to be levied upon the mortgaged premises and a sale thereof had. This in many cases led to the sacrifice of the debtor's property, and in *Tice v. Annin*, 2 Johns. Ch., 125, it is suggested in case a mortgagee should elect to proceed in this manner, and having sold the equity of redemption under a *fi fa*, should afterwards attempt to collect his debt out of other property of the mortgagor, equity would either stay the proceeding or compel him upon payment of the debt to assign the same and the security to the mortgagor to enable him to indemnify himself out of the mortgaged premises. Afterwards the statute of that state was amended so as to prohibit a sale of the mortgaged premises upon an execution issued on a judgment on the mortgage debt, and also prohibiting an action at law while the action to foreclose was pending. Our statute is very nearly in the same language as that of New York, and probably was copied from it. 2 Van Santvoord's Eq. Pl., 84. An allegation that no proceedings at law have been had for the recovery

of the debt is clearly sufficient as a denial that such proceedings had been instituted.

The principal ground of defense is that of duress. The answer states in substance that on the day the mortgage was executed her husband came to the house with a notary public, having the note and mortgage already prepared; that her husband stated to her that he had embezzled moneys belonging to one Daubney, the mortgagee; that a warrant was already issued for his arrest, and that he would be sent to the penitentiary; that thereupon he drew a loaded revolver and said that he would not be arrested, but that he would shoot any one that attempted to arrest him; that the wife fearing that perhaps her husband would shoot any one who should attempt to arrest him, and believing from his statement that he had committed an offense for which he would be sent to the penitentiary, executed the note and mortgage in question. The proof fails to establish some of the allegations of the answer; but in our opinion the answer fails to show duress. The common law divided duress into two classes, viz., duress *per minas* and duress of imprisonment. Duress *per minas* is restricted to fear of loss of life, or mayhem or loss of limb—in other words, remediless harm to the person. Duress by imprisonment is supported by any evidence that the party was unlawfully restrained of his liberty until he would execute the instrument. 2 Greenleaf Ev., §§ 301, 302. The testimony fails to show that Daubney had made any threats to have Whittemore arrested, while it does appear that neither he nor his attorney was present when the mortgage was executed, and never had any conversation with Mr. Whittemore in regard to signing the same. Whittemore having used funds intrusted to him seems to have believed that he could be convicted of embezzlement and sent to the penitentiary, and in order to prevent his conviction the wife signed the mortgage. It is said that this restraint was such as to avoid the mortgage. Suppose the

husband had been arrested and was about to be sent to jail, and the wife to prevent his imprisonment had entered into a recognizance for his appearance. In case of his escape could she plead as a defense that the recognizance was entered into under duress and that therefore she should be discharged? Could such a plea be sustained? If not, why can a mortgage made under similar circumstances to secure money embezzled, and thereby prevent a conviction for a crime and the disgrace of imprisonment be declared invalid? A recognizance must be entered into voluntarily equally so as the execution of a deed, yet the plea of force would be unavailing. And no court has a right to deprive a wife of the power to secure or pay a debt where it will save herself and family from disgrace—as would be done, in effect, if it should be held that she was not bound by any agreement she made under circumstances like the present.

But even if the mortgage had been executed under duress, it would not avail the defendant. A contract made under duress is voidable, not void. Thus, suppose a mortgage is executed in proper form by a person upon his real estate. The signature would be genuine, and the attesting and acknowledgment as required by the statute. If the mortgage was recorded it would contain nothing on its face affecting its validity or putting a purchaser upon inquiry. The acknowledgment would state that the execution of the instrument was the voluntary act of the grantor. To overcome this the grantor must show affirmatively that the certificate is untrue. As between the parties, this may be, done as a defense to the action to foreclose; but as to *bona fide* purchasers, it is not so clear that it would be available. Suppose the instrument was a deed, which was duly recorded, and no attempt made to set it aside, would not a *bona fide* purchaser for value from the grantee therein be protected? That he would will not be questioned, and no good reason exists why the purchaser of a mortgage should

 McMahon v. Spellman.

not be equally protected. But in this case the debt was in the form of a negotiable note, and the transfer of the same before due, for value, to a *bona fide* purchaser transferred to him a valid title free from equities between the parties. This is the rule established by this court in *Webb v. Hoselton*, 4 Neb., 308, and since adhered to. As it is shown that the plaintiff is such purchaser he is to be protected. The judgment of the court below is right, and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

15	653
17	471
17	630

JOHN C. McMAHON ET AL., APPELLEES, V. BENJAMIN
SPEILMAN ET AL., APPELLANTS.

1. **Homestead: CONVEYANCE.** Judgments were recovered against M. and W. in the county court in March, 1877, and transcripts filed in the district court in April of that year. In June following M. and wife conveyed the homestead to one G., who immediately reconveyed to the wife of M. No consideration was paid nor change of possession, and the premises continued to be occupied as the family homestead of M. *Held*, That the conveyance to G. was not an abandonment of the homestead, and it was not liable for the satisfaction of the judgments.
2. ———. A wife may claim the right of homestead.

APPEAL from the district court of Platte county. Heard below before POST, J.

Byron Millett, for appellants, contended that under the homestead law of 1875, p. 45, the judgments became active by the transfer of the title from McMahon to Griffin, and rendered property liable to sale. *Eaton v. Ryan*, 5 Neb., 47. That the deeds purport to be for a valuable consideration, and appellees are bound by the recitals therein. 1

Greenleaf Evidence, §§ 24, 25, 571. Bigelow Estoppel, 609. *McCrea v. Purmort*, 30 Am. Dec., 103, 117. And that the testimony of John C. McMahon was clearly insufficient under the statute of frauds to establish a trust. Comp. Stat., chap. 32, § 3. *Rasdall v. Rasdall*, 9 Wis., 379.

M. Whitmoyer, for appellees, cited: *Dorrington v. Myers*, 11 Neb., 391. *Spencer v. Fredendall*, 15 Wis., 666. *Murphy v. Crouch*, 24 Wis., 365. *Spencer v. Geissman*, 37 Cal., 99. *Orr v. Shraft*, 22 Mich., 260. *Stinson v. Richardson*, 44 Iowa, 373.

MAXWELL, J.

In March, 1877, Steele & Johnson recovered two judgments against John C. McMahon and John C. Wolf, in the county court of Platte county, one of said judgments being for the sum of \$103.50, and the other for \$104.65. Transcripts thereof were duly filed in the office of the clerk of the district court on the 13th of April of that year. At that time the plaintiff, John C. McMahon, owned two-thirds of a lot in Columbus, with the building thereon, which was occupied as a home by himself and family. On the 4th of June, 1877, McMahon and wife conveyed the premises in question to one Griffin, and Griffin and wife immediately reconveyed the same to Mary McMahon, the wife of John C. McMahon. The testimony tends to show that the conveyances were made and delivered at the same time, and were without consideration, and were made for the sole purpose of putting the title in the name of the wife. The premises then were, and ever since have been, occupied as a homestead for the family. In December, 1881, executions were issued on the above judgments and levied on the premises in question. The plaintiffs thereupon instituted this action, stating the above and other facts, and praying for an injunction. A temporary order

Roehl v. Roehl.

was granted, which on the trial was made perpetual. The defendants appeal to this court.

The only ground upon which they claim the right to sell the premises in question is because of the conveyance from McMahon and wife to Griffin. Had the premises actually been sold to Griffin, and ceased to be the plaintiffs' homestead, there is no doubt that they would have been liable for the satisfaction of the judgments in question under the statute as it existed at the time the transcripts were filed. But the testimony shows there was no sale to Griffin. He was a mere conduit for the transfer of the title from John McMahon to Mary McMahon. Whatever the object of this transfer may have been, it did not affect the right of homestead, as the wife equally with the husband may claim such right. As the premises in question have not been conveyed to strangers, nor ceased to be the plaintiffs' homestead, the right of the defendant to levy an execution on said premises did not accrue, it not appearing that the quantity exceeded the limit of the statute. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

15 655
17 98
19 401

AUGUST ROEHL, PLAINTIFF IN ERROR, V. BERTHA ROEHL,
DEFENDANT IN ERROR.

Presumptions in Favor of the Correctness of Proceedings. It is a well settled rule of law that every presumption is in favor of the correctness of the decisions of courts of general jurisdiction until the contrary is made affirmatively to appear.

ERROR to the district court for Pierce county. Tried below before TIFFANY, J.

Brome & Durland, for plaintiff in error.

A. F. Wilgoeki and Severance & Polack, for defendant in error.

REESE, J.

The only question presented by the record in this cause is as to the sufficiency of the service of summons. The officer's return is as follows:

"THE STATE OF NEBRASKA, }
Pierce County. } ss.

"I hereby certify that on the 24th day of March, 1883, I served the within writ of summons on the within named August Roehl by leaving a certified copy at his usual place of residence, as required by law."

The only objection is that the place where the copy was left was not the usual place of residence of the defendant, and that the sheriff's return, in that particular, is not true. The plaintiff in error supported his objection to the jurisdiction of the court by affidavits. The defendant in error (plaintiff below) supported the return with oral testimony of witnesses in court. After hearing all the evidence, the court decided that the place where the copy of the summons was left was the usual place of residence of the plaintiff in error.

The bill of exceptions shows that two letters from the plaintiff in error to the defendant in error were introduced in evidence, but no copy of said letters is preserved in the bill, nor is any reason given why they are omitted. The question of fact was submitted to the court, and the presumption is its decision was supported by sufficient evidence.

The decision of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

THE CITY OF OMAHA, PLAINTIFF IN ERROR, V. JOHN CANE, DEFENDANT IN ERROR.

1. **Negligence: VERDICT NOT AGAINST EVIDENCE.** In an action against a municipal corporation for negligence, where the question of the contributory negligence of the plaintiff is submitted to the jury, and found against the city, the verdict will not be set aside unless clearly wrong.
2. ———: **PRACTICE: CONTINUANCE.** Where the injury is alleged in the petition to have occurred in December, and the testimony showed that it occurred in the previous September, it is not error to overrule a motion for a continuance, it not appearing that the change of time affected the defense.
3. **Juror Interested in Result of Suit.** Where a person called as a juror was a property holder and resident of the municipality against which the action was brought, in his examination on his *voir dire*, in answer to the question whether, if the evidence was equally balanced, his interest would influence his verdict, answered, "I think it might," *Held*, That he was properly excluded from the jury.

ERROR to the district court for Douglas county. Tried below before NEVILLE, J.

William J. Connell, for plaintiff in error, on verdict cited: *Omaha Horse Railway v. Doolittle*, 7 Neb., 481. *Fort Wayne v. Krichbaum*, 24 Ohio State, 119. Continuance. *Billings v. McCoy*, 5 Neb., 187. Juror improperly excluded. *Omaha v. Olmstead*, 5 Neb., 446. *Corwein v. Hames*, 11 Johns., 76. *Hill v. Wells*, 6 Pick., 104.

H. D. Estabrook (with whom was *E. F. Smythe*), for defendant in error, on contributory negligence, cited: 2 Dillon Mun. Corp., § 1020 n. *Whittaker v. West Boylston*, 97 Mass., 273. *Shear & Redf. Negligence*, § 414. Continuance. *Roberts v. Ward*, 8 Blackf., 333. *Hawkes v. Lands*, 3 Gilm., 227. Juror. *Wood v. Stoddard*, 2 Johns., 194.

MAXWELL, J.

This action was brought by Cane against the city of Omaha in the district court of Douglas county, to recover for personal injuries sustained by him on the night of the 15th of December, 1879, in consequence of an obstruction placed by the city in the middle of Thirteenth street in said city. On the trial of the cause in the court below, a verdict was rendered in favor of Cane for the sum of \$806, upon which judgment was rendered.

The errors assigned in the plaintiff's brief will be considered in their order.

First, That the verdict is not sustained by sufficient evidence. It appears from the testimony that, on the night the injury occurred, Cane, who was possessed of a mule which was attached to a cart in which Cane and wife were riding, drove into Omaha from the south, and in driving along Thirteenth street, the night being very dark he drove his cart against a brick man-hole rising several feet above the center of the street, overturning the cart and throwing himself and wife on the ground and inflicting serious injuries upon him. There is no doubt as to the serious character of the injuries inflicted, and the question of negligence being properly submitted to the jury, we are of the opinion that there is sufficient testimony, showing a failure of the proper authorities of the city of Omaha to perform their duty in regard to the obstruction in question, to sustain the verdict.

Second, That the verdict is contrary to law. The objection made is that the carelessness of Cane himself as well as that of the city operated directly to produce the injury complained of. This objection was evidently made under a misapprehension as to the testimony, as it fails to show negligence on the part of Cane.

Third, That the court erred in refusing to grant a continuance. It appears from the record that Cane on cross-

examination stated that the accident occurred in September and not in December as alleged in the petition. Thereupon the attorney for the city asked for a continuance upon the ground that he was taken by surprise, and that the date was a material fact upon which the city could predicate a defense. It is pretty evident that the object of asking for a continuance was to delay the trial as long as possible, and not because the city had a valid defense to the action; and the court did not err in overruling the motion.

Fourth, That the court erred in sustaining a challenge for cause to one D. Kenniston called as a juror. The juror in question was asked if he was a property holder in the city of Omaha, which he answered in the affirmative. In answer to a number of questions he stated in substance that he would endeavor to give a fair verdict according to the evidence. The following questions were then put to him:

Q. As a tax-payer you don't want to pay out any more money from the city exchequer than is necessary?

A. No sir. In this I have the same interest that anyone would have.

Q. Is not that such an interest as would influence your verdict in a case of dubious or equally balanced evidence?

A. I hardly think so.

Q. But might it not?

A. I think it might.

The law guarantees to parties fair and impartial jurors, men who are indifferent and will be governed entirely by the evidence in rendering their verdict. This rule should not be relaxed, and where it is apparent from an examination of a juror on his *voir dire* that he will permit his interest in any event to influence him in returning a verdict, he should be rejected. The court did not err therefore in sustaining the challenge to the party named. There is no error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

15	660
37	663

JOHN E. WHITE ET AL., PLAINTIFFS IN ERROR, V. THE
GERMAN INSURANCE CO., DEFENDANT IN ERROR.

Justice of Peace: SERVICE OF SUMMONS. In cases where a justice of the peace has cognizance, a summons served three days including the day of service, before the time set for trial, is sufficient to give the justice jurisdiction.

ERROR to the district court for Kearney county. Tried below before GASLIN, J.

Joel Hull, for plaintiff in error.

W. W. Wood, for defendant in error.

MAXWELL, J.

On the 24th of June, 1882, the defendant in error commenced an action against the plaintiffs in the county court of Kearney county upon a promissory note to recover the sum of \$12.50. Summons was thereupon issued returnable on the 29th of that month. The return is as follows: "Received this summons 26th day of June, 1882, and I hereby certify that on the same day I served the same on the within named John E. White by delivering to him a true and certified copy of the summons, and on the within named R. W. White by leaving a certified copy at his usual place of residence." On the return day of the summons, the following motion was filed: "John E. White makes special appearance for himself, and by his attorney, and objects to the jurisdiction of the court for want of service, and states that the officer served the summons in this action upon him personally by handing him a copy at about 2 o'clock P.M. on the 26th day of June, 1882." The justice overruled the objection and rendered judgment in

favor of the defendant in error, which judgment was affirmed by the district court.

The errors assigned in this court are in substance that the court below had no jurisdiction. A motion should specifically point out the very objection made. Courts do not look with favor upon technical motions or pleas, and if such are overruled, it must appear that the party complaining has sustained injury thereby. The objection made in this case undoubtedly was intended to apply to the *time* of service of summons.

Sec. 911 of the code provides that "the summons must be returnable not more than twelve days from its date, and must, unless accompanied by an order of arrest, be served at least three days before the time of appearance, etc.

Sec. 895 provides that "the time within which an act is to be done as herein provided shall be computed by excluding the first day and including the last," etc. This is not a new question in this state. The justice code has been in force about twenty-five years, and the almost invariable practice under it has been to make the summons returnable on the fourth day from the date of service—that is, excluding the first day, or day of service, and including the last. This being the general construction placed upon the statute, and as the validity of judgments depends thereon, we do not think it proper at this time to give the language a different construction. We therefore hold that the service was made a sufficient length of time before the return day to give the court jurisdiction. The judgment must therefore be affirmed.

JUDGMENT AFFIRMED

THE other judges concur.

662 SUPREME COURT OF NEBRASKA,

Westheimer v. Reed.

15 662
45 671

SAMUEL WESTHEIMER, PLAINTIFF AND APPELLANT, V.
WILLIAM L. REED, ELIZABETH K. REED, JOHN A.
KILLMER, CYRUS LANGWORTHY, AND THE BUR-
LINGTON & MISSOURI RIVER RAILROAD COMPANY
IN NEBRASKA, DEFENDANTS AND APPELLEES.

Execution Sale: TITLE ACQUIRED BY PURCHASER. In a sale of real estate upon execution, the purchaser acquires no greater right or title to the land sold than the judgment debtor had at and prior to the time of the sale; and an after acquired title of the judgment debtor will not inure to the benefit of such purchaser.

APPEAL from the district court of York county. Heard below before NORVAL, J.

Mason & Whedon, for appellant, cited: *Filley v. Duncan*, 1 Neb., 134.

Sedgwick & Power, for appellee Killmer, cited: *Drake on Attachment*, § 223. *Merchants v. O'Connor*, 29 Ohio State, 654. *Board v. Shaw*, 15 Kan., 41.

REESE, J.

On the 15th day of March, 1883, the plaintiff filed his petition in the district court of York county alleging in substance, that at the adjourned term, 1880, of the United States circuit court for the district of Nebraska, the plaintiff obtained a judgment against W. A. Reed, one of the defendants, for the sum of \$651.20; that an attachment had before that time been issued in said cause, and levied on the real estate in question. An order of sale was issued thereon on the 23d day of April, 1880, directed to the marshal, requiring him to make the amount of the judgment and interest from March 27, 1880 (probably the date of the judgment).

Westheimer v. Reed.

On the 27th day of April, 1880, the marshal levied on the land, and on the 31st day of May, following, he sold it to the plaintiff for the sum of \$400. At the following November term of said court, the sale was confirmed, and a deed ordered to be made. On the 6th day of January, 1881, the marshal executed the deed to the plaintiff, who caused it to be recorded on the second day of April following. At the time of the levy under the attachment, and of the sale by the marshal, Reed was the owner and in possession of the land by virtue of the contract of purchase, more particularly set forth in the petition, and seized of a legal and equitable estate therein. The Burlington & Missouri River Railroad Company in Nebraska being the owner of said land by grant from the United States, on the 22d day of June, 1880, by contract for a deed, sold and contracted said land to F. W. Liedtke, at which time Liedtke paid \$100 of the purchase price. Subsequently, and prior to the 31st day of January, 1881, Reed, with his own money and for his own use, purchased the contract of Liedtke, and took possession of the land, but Liedtke still retained the contract in his own name. At that time, Reed was indebted to the plaintiffs, as shown by said judgment, and in failing circumstances. On the 31st day of January, 1881, Reed, with fraudulent intent, procured Liedtke to assign the contract to Elizabeth K. Reed, his wife, and on the 14th day of November, 1881, for the purpose of keeping the land out of the reach of his creditors, Reed caused his wife to assign the contract to Cyrus Langworthy, a brother-in-law of said Reed. On the 18th of May, 1882, in furtherance of the fraudulent design, Langworthy assigned the contract to John C. Killmer. Langworthy and Killmer took their assignments with full knowledge of all the facts. Payments have been made to the R. R. company since the sale to Liedtke by the holders of the contract, but Reed has furnished the money to make such payments. The remainder of the purchase price of

the land has been tendered to the R. R. company and a deed demanded, which was refused. Prayer for decree requiring Reed, Langworthy, and Killmer to assign and deliver the contract to the plaintiff as it stood at the date of the attachment, and that the R. R. company be required to make to him a deed upon the payment of the residue of the purchase money.

To this petition a general demurrer was filed, which was sustained and the cause dismissed. The plaintiff brings the suit into this court for the purpose of reversing the judgment of the district court.

By an examination of the petition we find that the land was not sold by the R. R. company until nearly a month after the sale by the marshal, and that Liedtke did not sell the contract to Reed until after the marshal's deed had been made, and that during all the legal proceedings against the land as the property of Reed it belonged to the R. R. company. There is no fraud alleged as between the R. R. company and Liedtke. Therefore, Reed had no title to the land at the time of the sale, and the plaintiff received nothing by his purchase. The plaintiff in attachment can acquire no higher right to attached property than the debtor had at the time of the levy of the attachment. Drake on Attachment, § 223. And the purchaser at sheriff's (or marshal's) sale acquires no greater right or title than the judgment debtor had at the time of sale or prior thereto. Compiled Statutes, § 500, civil code. *Mansfield v. Gregory*, 8 Neb., 432.

It is true the plaintiff alleges that at the time of the rendition of the judgment the defendant, Reed, was the owner of and in possession of the land. But it is further alleged that such ownership and possession "was by virtue of the contract of purchase hereinafter more particularly set forth," and in the latter part of the petition he "sets forth" the "contract of purchase" made by the railroad company to Liedtke, and alleges that Reed "took possession of said

Bullock v. Jordan.

land" in 1881, under his purchase from Liedtke. Applying the well-settled rules for the construction of pleadings to these allegations, we are required to adopt the latter allegation as the true one, and by this we are informed that his possession dates only from his purchase from Liedtke.

It is finally claimed by the plaintiff that "this is a creditors' bill to reach assets of the judgment debtor which are charged to be fraudulently covered by the co-defendants of the judgment debtor." We cannot so consider it. There is no allegation that the defendant, Reed, is insolvent, nor that he has no personal or real property subject to execution sufficient to satisfy the judgment, and it is clearly apparent that the pleader had no thought of a creditors' bill when drawing the petition. Viewed as such a bill, it is equally clear that the demurrer was properly sustained.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

DANIEL BULLOCK, PLAINTIFF IN ERROR, V. D. C.
JORDAN, DEFENDANT IN ERROR.

15	665
15	669
16	234
18	366

Jurisdiction of Justices. Under the provisions of section 1103 of the code, justices of the peace have jurisdiction of causes founded on promissory notes, bonds, or other written instruments, where the sum in question does not exceed two hundred dollars.

ERROR to the district court for Butler county. Tried below before POST, J.

Horace Garfield, for plaintiff in error.

J. W. McLoud and S. Clingman, for defendant in error.

COBB, CH. J.

The sole question presented in this case is, whether under the provisions of section 1103 of the civil code a justice of the peace possesses jurisdiction to try and render judgment in a case founded on a promissory note for a sum in excess of \$100, but not exceeding \$200.

Section 1103 reads as follows: "Justices of the peace shall have jurisdiction in all cases where the sum in question does not exceed two hundred dollars, except in cases limited in this title." Among the many sections contained in the same title is section 1100, which reads as follows:

"In all actions instituted before a justice of the peace, founded upon any bond, bill, promissory note, or other instrument of writing for the payment of a sum of money certain, of which the whole amount of money promised therein is due, it shall be the duty of the plaintiff, his agent, or attorney, to file said bond, bill, promissory note, or other written evidence of indebtedness upon which said suit is brought with such justice of the peace; and if upon the trial, judgment shall be entered thereon in favor of the plaintiff, such bond, bill, promissory note, or other instrument in writing shall be retained by the justice so rendering judgment, who shall endorse thereon the sum for which he shall have entered judgment (provided the same shall in no wise exceed one hundred dollars!) and shall subscribe his name thereto. And upon payment, or tender of the amount of such payment, together with the costs accruing thereon or securing the payment of the same by putting in bail for the stay of execution, it shall not be lawful for the plaintiff to institute any other suit or suits upon such bond, bill, promissory note, or other instrument of writing, for the recovery of any other sum or sums, the payment of which is secured by the same bond, bill, promissory note,

or other evidence of indebtedness; *Provided*, That when an appeal shall be taken from the judgment of such justice it shall be his duty to transmit any bond, bill, promissory note, or other written evidence produced before him on trial, to the clerk of the district court to which such cause shall have been appealed, on or before the second day of the term of the court next after taking such appeal; *Provided, also*, That nothing herein contained shall be construed to lessen or in anywise affect the right which any creditors now have to demand from any justice of the peace, any joint and several obligation, for the purpose of prosecuting any party to said obligation, other than the party against whom judgment may have been rendered."

Now is it this section 1100 that is referred to in 1103 as limiting the jurisdiction of justices of the peace? I think not.

First, Because such a construction would nullify the purposes of the act by which said section 1103 became a law.

Second, Because said section 1100 is not a jurisdictional section; its object is to point out to justices of the peace the method of rendering judgments on promissory notes, bonds, and other instruments in writing; prescribing the duties of such justice, and limiting the rights of parties to actions before him in certain cases. The words, "provided the same shall in nowise exceed \$100," seem to have been thrown in lest the general language of the section might be construed as enlarging the jurisdiction of justices to the amount of such note or bond although the same might exceed one hundred dollars, when for a great while after the enactment of this section such jurisdiction was limited in all cases to one hundred dollars.

It will be borne in mind that section 1103 was enacted and took effect June 1st, 1881; while section 1100 has been upon the statute books for at least twelve years prior to that time.

Third, Because the limitation contained in section 1103

has a clear meaning and perfect application, without resorting to the provisions of section 1100. Section 907, being a part of the same title, provides as follows:

"Justices shall not have cognizance of any action ; *First*, To recover damages for an assault, or assault and battery. *Second*, In any action for malicious prosecution. *Third*, In actions against justices of the peace or other officers for misconduct in office, except in the cases provided for in this title. *Fourth*, In actions for slander, verbal or written. *Fifth*, In actions on contracts for real estate. *Sixth*, In actions in which the title to real estate is sought to be recovered, or may be drawn in question, except actions for trespass on real estate, which are provided for in this title."

It was not the intention of the legislature to change or in any manner meddle with these provisions; but had it not been for the exception contained in section 1103 it will be seen at a glance that it would have given justices of the peace jurisdiction in these cases as well as in any others; and it was the intention of the framers of the section, in the use of the language which they did use, to prevent this. Thus we see that we may give to every word of section 1103 an effect and application without resorting to the provisions of section 1100.

Again, as well argued by counsel, if this view be not correct, then for the whole time of the existence of section 1100 prior to June 1st, 1881, the limitation contained in this section had no force or effect whatever, but was lying dormant to come into use upon the enactment of the amendment of 1881; because until such enactment, the jurisdiction of justices in no case exceeded one hundred dollars.

The justice and the district court undoubtedly placed the proper construction upon these statutes, and the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

GEORGE W. BURTON, PLAINTIFF IN ERROR, V. PATRICK
MANNING, DEFENDANT IN ERROR.

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16 234
18 366

SAME as *Bullock v. Jordan, supra*.

ERROR to the district court for Harlan county. Tried
below before GASLIN, J.

John Dawson, for plaintiff in error.

No appearance for defendant in error.

BY THE COURT.

This cause was commenced before a justice of the peace of Harlan county by the plaintiff in error against the defendant in error on a promissory note given for the sum of one hundred nineteen dollars and thirty-four cents. A judgment was rendered in favor of the plaintiff for one hundred twenty-five dollars and eighty cents. The cause was then taken to the district court on error. The district court found error in the judgment of the justice of the peace, reversed the same, but retained the cause for trial in the district court. Whereupon the plaintiff brings the cause to this court on error.

The question thus presented is identical with that decided in the case of *Bullock v. Jordan*, and is disposed of accordingly.

The judgment of the district court is therefore reversed, and that of the justice of the peace affirmed.

JUDGMENT ACCORDINGLY.

A. G. ADAMS, PLAINTIFF IN ERROR, V. MARSHALL D.
HADDOX, DEFENDANT IN ERROR.

This case presents only a question of the weight of evidence, and no question of law.

ERROR to the district court for Howard county. Tried below before NORVAL, J.

O. A. Abbott and S. R. Wallace, for plaintiff in error.

Thomas Darnall, Henry Nunn, and Paul & Bell, for defendant in error.

COBB, CH. J.

This is a petition in error to the district court of Howard county, brought for the purpose of reversing the order of said court discharging an order of attachment. The record is voluminous; there having been a large number of witnesses sworn at the hearing, and their testimony taken down in writing and returned. The question is one purely of fact, and, in short, is whether the sale of the stock of goods in question by the defendant in error, Haddox, to a Mr. Dinsmore, was made with the intent to defraud, hinder, or delay his creditors, or was it made in good faith?

The district court, having the witnesses before it and hearing their testimony, came to the conclusion that said sale was made in good faith, and for a valuable consideration, and not in fraud of the creditors of said Haddox, and discharged the attachment.

After the hearing in this court, we carefully read and considered all of the testimony, and unanimously came to the conclusion that the district court in arriving at the judgment which it did was sustained by the evidence, and justified in rendering that judgment.

Simpson v. Jennings.

I cannot conceive that it would conduce to any good purpose to go over the testimony and attempt to present its salient points in an opinion, and will not do so; but simply announce as the decision of this court that the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

RICHARD D. SIMPSON ET AL., PLAINTIFFS IN ERROR, v.
GEORGE JENNINGS ET AL., DEFENDANTS IN ERROR.

Set-off. A claim on the part of a defendant, which he will be entitled to set-off against the claim of a plaintiff against him, must be one upon which he could, at the date of the commencement of the suit, have maintained an action on his part against the plaintiff.

THIS cause came before the court at the January term, 1882, and is reported with a statement of facts in 12 Neb., 558. After reversal here, the defendants below, by an amended answer, claimed as a set-off the judgment referred to in the opinion. To this set-off the plaintiffs demurred, the demurrer was sustained, and evidence of said set-off also excluded, to which rulings the defendants excepted, and judgment being rendered against them before POUND, J., they brought the cause here by petition in error.

Edwin F. Warren, for plaintiffs in error, cited: § 104, Code. *Boyer v. McCandless*, 3 Neb., 161. *Thrall v. Hotel Co.*, 5 Neb., 295. *Lindsay v. Jackson*, 2 Paige, 582. *Pond v. Smith*, 4 Conn., 302. *Gilman v. Van Slyck*, 7 Cow., 469. *Id.*, 480. *Gridley v. Garrison*, 4 Paige, 647. *Waterman on Set-off*, chap. VIII.

15	671
18	173
15	671
37	608
15	671
141	150
15	671
44	76
15	671
53	18
15	671
58	48
15	671
61	619

S. H. Calhoun, for defendants in error, cited, *inter alia*: *Barbour Set-off*, 91. *Davis v. Neligh*, 7 Neb., 88. *O'Leary v. Iskey*, 12 Neb., 137. *Waterman Set-off*, §§ 414-416. *Martin v. Kunzmüller*, 87 N. Y., 396. *Henry v. Butler*, 32 Conn., 140. *Frazier v. Gibson*, 7 Mo., 271. *Houston v. Fellows*, 27 Vt., 634. *Reed v. Chubb*, 9 Iowa, 178. *Taylor v. Williams*, 14 Wis., 155. *Straus v. Eagle Ins. Co.*, 5 Ohio State, 59.

COBB, CH. J.

The main question presented by the record in this case is the alleged error of the court below in refusing to allow the set-off presented by the defendants therein in their amended answer. This set-off consists of a judgment recovered against George Jennings and Anna Maria Jennings, in her lifetime, by one John Dill, and which said judgment came to the hands of the plaintiffs in error, other than the said Richard D. Simpson, by assignment of the said John Dill, since the commencement of said action in the court below.

The question thus distinctly raised is found upon examination not quite so easy of solution as the writer supposed when it was announced at the hearing that the case probably turned on this point. The defense of set-off is a statutory one, although many usually careful courts have spoken of set-off at common law, notably the circuit court of the United States for the first circuit, per Judge Story, in *Hurlbert v. Pac. Ins. Co.*, 2 Sum., 471, and the supreme court of Wisconsin, per C. J. Dixon, in *Orton v. Noonan et al.*, 29 Wis. R., 541. The English statute, 2 Geo. II., chap. 22, § 13, is the pioneer which is followed to a greater or less extent by the statutes of most of the states; and I have found none that agree with it in its language, and have found scarcely two of them that agree with each other. It will accordingly readily be seen that cases arising under

these differing provisions of the statutes of the several states upon a point purely statutory are of little value as authority. The provisions of our statute of set-off are copied literally from the Ohio statute. Although their statute of set-off has often been construed by the supreme court of that state, yet I can not find a single case where the precise point now under consideration has been before that court. The case of *Straus v. Eagle Ins. Co.*, 5 Ohio State, 59, cited by counsel for defendants in error, was submitted to that court on an agreed state of facts, from which it appeared that the notes, which it was sought to set-off against the policy of insurance sued on, had been given by the plaintiffs to several of their creditors in New York, and upon which there was then due about \$3,000, were endorsed by the holders to the defendant company before the commencement of the suit and in accordance with a written agreement made with the secretary of the company, which, after acknowledging the transfer of the notes, and reciting that they were purchased for the purpose of paying off and discharging the amount due upon the policy, bound the company to pay therefor the sum of \$2,000, provided they could be made available for that purpose; but if the amount due upon the policy had been assigned, so that it could not be paid with the notes, and the company were unable to set-off the same against the claim, then the company was authorized to return the notes in discharge of the said sum of \$2,000, etc. The opinion of the court by Judge Ranney holds that, the insurance company had no power under its charter to use its surplus funds in buying up the notes of its policy-holders to set-off against their demands for losses; that to allow it to do so would be contrary to public policy, etc.; and finally concludes in the following language:

“It becomes unnecessary to consider the further question as to the right of the defendant to use these notes as a set-off under the conditional agreement upon which they were

obtained. I shall only add that a set-off can only be allowed for such claims as, in good faith and absolutely, belonged to the party at the commencement of the action; and that it does not extend to claims purchased conditionally for the purpose of using them as a set-off, and with an agreement to return them to the seller if they are not so used. The statute was designed to avoid circuitry of actions, by enabling the defendant to obtain the benefit of his own joint claims against the plaintiff; but it would be a fraud upon it, to allow him, in anticipation of a law-suit, to get the use merely of the claims of others with which to defeat his adversary." The set-off was disallowed.

In the case of *Orton v. Noonan et. al., supra*, C. J. Dixon in the opinion says: "We see nothing in the statute concerning counter-claims, nor in the provision last referred to, which indicate an intention on the part of the legislature to depart from the familiar common law principle that a cause of action, whether sued upon by a plaintiff or pleaded in offset by a defendant, must be one existing and upon which a right of recovery had accrued when the action commenced. * * * If the motion was for leave to interpose an equitable counter-claim arising out of the contract or transaction set forth in the complaint since the commencement of the action, then perhaps a different question would be presented. It might then possibly be that the rules of practice or mode of proceeding should be the same as govern a court in equity, notwithstanding the demand against which the counter-claim is interposed is a legal one, and the action one at law. Counsel has cited us to no case where such a counter-claim has been allowed by way of supplemental answer; and the former practice in equity we know was for the defendant to bring in his cross bill; and the old equity practice as to when a complainant could file a supplemental bill charging new facts occurring after the original bill was filed is also well known. The new facts must have been such as went to support and strengthen

the allegations of the original bill, and could not be such as amounted to the statement of a new and distinct cause of action. The office of the supplemental complaint was to bring upon the record new facts of the former kind; but if the original complaint was wholly defective, and without equity, the plaintiff could not, by filing a supplemental complaint founded on matters which had taken place subsequent to the commencement of the suit, sustain the proceeding originally commenced."

In the case of *Cook v. Mills*, 5 Allen, 37, C. J. Bigelow thus defines a set-off: "A debt for which an action might be maintained by the defendant against the plaintiff; that is, a debt for a certain specific pecuniary amount, and recoverable in an action *ex contractu*. It is in a strict sense a 'cross' debt or demand due to the defendant unconnected with the plaintiff's claim, so that it could not be shown in payment or reduction of the amount due thereon at common law." He adds, "As the main purpose of the statute of set-off was to allow a defendant to establish his debt against the plaintiff without resorting to a separate action, and thus to avoid multiplicity of suits, it seems to us that the case at bar is one which comes clearly within the equity as well as the letter of the statute."

The consideration of the reasoning of the above cases, with many others which it is not deemed necessary to cite, brings me to the conclusion that a claim on the part of a defendant which he will be entitled to set-off against the claim of a plaintiff against him must be one upon which he could, at the date of the commencement of the suit, have maintained an action on his part against the plaintiff.

The other points made in the petition in error not being urged in the brief of plaintiff in error will not be considered.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

WILLIAM M. BUSHMAN, APPELLEE, v. THOMAS GIBSON
ET AL., APPELLANTS.

Conveyance: STREETS AND ALLEYS. Where certain lands in an addition to a city, but not platted, were conveyed by metes and bounds, one of the calls in the deed being a certain number of feet to an alley, thence along said alley, etc., there being in fact no alley at the place indicated, as was well known to the purchaser, but a strip twenty feet in width was reserved for that purpose when the city in fact was extended to that point, *Held*. That the alley was not a public one, and the purchaser could not enjoin the owner of the fee from erecting bars across the same.

APPEAL from the district court for Douglas county.
Tried below before WAKELEY, J.

Bartlett & Cornish, for appellants.

Andrew Bevins (*George B. Lake* with him in motion for rehearing), for appellee.

MAXWELL, J.

This is an action to restrain the defendants from obstructing an alley adjoining the plaintiff's real estate in the city of Omaha. On the trial of the cause in the court below, a perpetual injunction was granted against the defendants as prayed in the petition. The defendants appeal.

It appears from the record that in the year 1878 the defendant, Thomas Gibson, was the owner of certain real estate a short distance west of the city of Omaha proper, although included in an addition to the city. This land was not platted, but an extension of Harney street of said city west would pass along the south side of the same. The land for an extension of this street the defendant had conveyed to the public for that purpose. In October of that year, the defendant sold and conveyed to the plaintiff a portion of said real estate described as follows: "A certain parcel of land, commencing at a point

(588) five hundred and eighty-eight feet west of the east line of lot No. (6) six in Capitol addition to the city of Omaha, and two hundred and eighty-four feet south of the south line of Farnam street, running west along the north line of Harney street as proposed to be extended two hundred and fifty feet, thence north one hundred and thirty-two feet to an alley (20 feet), thence east along said alley two hundred and fifty feet, thence south one hundred and thirty-two feet to the place of beginning, and all being in lot No. six in Capitol addition to the city of Omaha as located on the records." The question for determination is, whether or not the obstruction complained of was across a public alley. Neither a conveyance to the public nor a dedication of the ground claimed as an alley is shown, so that if one exists it must be because the defendants are estopped from denying the description in the deed to the plaintiff.

In *Gregory v. Lincoln*, 13 Neb., 352, the owner of certain real estate laid the same off into an addition to the city of Lincoln, and filed a plat on which "K" street was marked as if laid out, and lots were sold fronting thereon. It was held that the filing of the plat and the sale of lots fronting on "K" street estopped the owner and his assignee from denying the existence of the street. And we adhere to that decision; but it has no application to the case under consideration. Here the land was sold by metes and bounds, it being well known to all parties that there was no public alley adjoining the plaintiff's land, although a space twenty feet in width was left to be used for that purpose when the city limits extended in fact to the land in question, and it was needed for that purpose. The cases cited by the plaintiff refer to public ways, and are not applicable to the one under consideration. The testimony clearly shows that it was not the intention of the parties at the time the deed was made to pass any interest to the plaintiff beyond the metes and bounds described in the deed.

Bushman v. Gibson.

The alley not being a public one, and as the proof fails to show that the plaintiff acquired an easement therein, he cannot enjoin the defendant from erecting bars across the same. The judgment must therefore be reversed, and the action dismissed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

MAXWELL, J.

A rehearing is asked by the plaintiff in order that the court may render an opinion as to whether the defendants have the right wholly to exclude the plaintiff from the use of the alley in controversy or not. We do not think that question is raised by the pleadings, and it cannot properly be answered in this action. The plaintiff purchased his land by metes and bounds, well knowing that there was no alley on the north of said tract, although the defendant stated that a strip would be reserved for that purpose when required by the city. The case would be entirely different if the defendant had represented that he had laid out the strip of land in controversy as an alley, or had received a consideration for the same. He testifies that he told the plaintiff before the sale was made that he would sell him the land to the proposed alley for a certain sum, or he would sell to the middle of the same for a proportionate increase of the price; and that Mr. Bushman only purchased and paid for the land to the alley. The plaintiff fails to deny this, and it would seem to be conclusive. He refused to purchase to the middle of the proposed alley, and certainly has no cause of complaint if the court refuses to declare that he has an interest therein. The motion for a rehearing must be denied.

MOTION DENIED.

APPENDIX

CP

MATTERS SUBMITTED TO AND OPINIONS OF THE COURT.

1883-1884.

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25	684
15	679
50	371
50	372
150	376
150	746

IN RE RAILROAD COMMISSIONERS.

Constitutional Law. The legislature have no power under the constitution to create railroad commissioners. The supervision of railroads by a commission would be proper, but the power must be conferred on executive offices already existing.

THIS was a matter coming before the court by the following document:

"WHEREAS, The constitutionality of the railway commissioner system has been questioned, and there are differences of opinion among the members of this legislature as to the construction of sec. 26 of article V. of the constitution of the state of Nebraska, which provides that 'No other executive state office shall be continued or created,'

"*Therefore be it Resolved*, That the members of the supreme court of this state be and are hereby respectfully requested to answer the following questions:

"1st. Would railway commissioners be state executive officers, or would the office of railway commissioner of the state be a state executive office if created by the legislature?

"2d. Would such an office if created by the legislature come within the inhibition of the constitution?

"3d. Would a law regulating the management of railroads in Nebraska under the commissioner system be obnoxious to any provision or provisions of the constitution of this state?

"4th. In your opinion could such a railroad commissioner law be framed that would be capable of enforcement?

"You are most respectfully requested to answer the above and foregoing questions in full at your earliest possible convenience.

"I certify the above to be a correct copy of the resolution adopted by the house of representatives on Jan. 22d, 1888.

"BRAD. D. SLAUGHTER,
"Chief Clerk.

"Lincoln, Jan. 23, '83."

OPINION OF THE JUDGES.

To the Honorable the House of Representatives of Nebraska:

We have the honor to acknowledge the receipt of a copy of a resolution adopted by your honorable body on the 22d day of the present month, whereby the judges of the supreme court were requested to answer the important question hereinafter stated.

While we cheerfully comply with that request, we desire in the first place to say, that courts or judicial officers, in this state at least, are but seldom called upon to decide or pass an opinion upon important legal or constitutional questions without first having the benefit of argument by counsel, who, stimulated by considerations of professional pride and the pecuniary interests of their clients, have usually exhausted the libraries of learning in search for reasons and precedents to sustain their respective sides of the question and the theories upon which they may be sustained, and even then it not unfrequently happens that a conclusion reached under these favorable circumstances may be reversed or materially modified after being brought to the test of experience and that free and enlightened discussion which the opinions of judges as well as the acts of legislators must undergo in this age and country. We

therefore enter with diffidence upon the examination of these important questions which, so far as we know, are now presented for the first time under our constitution, and in which examination we are without the aid of argument or discussion.

Taking up the questions in the order in which they are presented by the resolution, the first is as follows:

First. Would railway commissioners be state executive officers, or would the office of railway commissioners of the state be a state executive office if created by the legislature? As railway commissioners are at present unknown to the constitution and laws of this state, we take it for granted that the house, in the wording of the resolution, had reference to those officers as known to the laws of some of our sister states. In looking into the statute of the state of Iowa, for instance, we find a law making it the duty of the governor, by and with the advice and consent of the executive council, to appoint three competent persons (one of whom shall be a civil engineer), who shall constitute a board of railroad commissioners, etc. The act in its several sections provides salaries for these commissioners, to be paid out of the state treasury; that they shall hold their office at the state capital; and in many provisions makes their duties co-extensive with the limits of the state. There can be no doubt then that were a commission of this general character provided for by an act of the legislature of this state, and such act contained the same or similar provisions as those contained in the act of the Iowa legislature referred to, such commissioners would be state officers. Whether they would be state executive officers, within the meaning of our constitution, must be determined by an examination of the provisions of that instrument.

The first clause of article II. of the constitution is in the following language: "The powers of the government of this state are divided into three distinct departments—the legislative, executive, and judicial."

Articles III. and IV. are devoted to the legislative department, investing its authority in a senate and house of representatives, limiting their powers, apportioning their representation among the several counties of the state, etc., etc.

Article V. is devoted to the executive department, and provides that it "shall consist of a governor, lieutenant governor, secretary of state, auditor of public accounts, treasurer, superintendent of public instruction, attorney general, and commissioner of public lands and buildings, etc."

Article VI. is devoted to "the judicial department."

The powers of the state government being thus, by the fundamental law, divided into these three distinct departments, it is clearly incompetent for the legislature to create a commission and invest it with any official power, without assigning the duties thereof to one or the other of them. The powers and duties of railroad commissioners, as defined by the statute of Iowa above referred to, are inherently executive. Webster, in defining this word, says: "In government, executive is distinguished from legislative and judicial; legislative being applied to the organ or organs of government which make the laws; judicial, to that which interprets and applies the laws; and executive, to that which carries them into effect." Even were it not inhibited by other clauses of the constitution, we do not think that it is desired or contemplated to invest such railway commission with the power to make laws, or even to interpret or apply them, but that such duties would be to aid in carrying the laws into effect.

Hence their duties would be executive, and it state officers, if paid out of the state treasury, and their field of duty co-extensive with the territorial limits of the state, they would be state executive officers.

The second question: "Would such an office, if created by the legislature, come within the inhibitions of the con-

stitution?" can, we think, after what has been said above, be answered by quoting a section of the constitution. Article V., after twenty-five sections devoted to the designation of the officers which shall constitute the executive department, their election, qualification, terms of office, duties, and salaries, concludes with the following: "SEC. 26. No other executive state office shall be continued or created, and the duties now devolving upon officers not provided for by this constitution shall be performed by the officers herein created."

The creation of an executive state office, or the providing for the election or appointment of an executive state officer not provided for in said article, could not well have been more clearly inhibited.

The two remaining questions may be stated and answered together.

Third. "Would a law regulating the management of railroads in Nebraska under the commissioners' system be obnoxious to any provision or provisions of the constitution of this state?"

Fourth. "In your opinion, could such a railroad commission law be framed that would be capable of enforcement?"

In answering the former questions, we have seen that all executive power must be enforced by the officers provided for by Article V., as constituting the executive department, and that the powers imposed upon railroad commissioners by the statute of the state of Iowa (and we presume the same to be of other states which have resorted to similar legislation) are executive, we know of no constitutional inhibition to the imposition of additional executive power, as such upon any or either of the officers constituting the executive department, and we do think it within the scope of legislative wisdom to frame a law for the regulation of the management of railroads under the commissioner system, with the above limitation as to the *personnel* of the com-

In re School Fund.

missioners, and within the limits of the constitutional powers of government over private or corporate rights, which would be capable of enforcement.

GEORGE B. LAKE,
Chief Justice.

AMASA COBB,
SAMUEL MAXWELL,
Judges.

IN RE SCHOOL FUND.

1. **Investment of School Fund.** The board of educational lands and funds have authority to invest the permanent school fund in U. S. three per cent bonds.
2. ———. Payment of premiums in purchase of U. S. bonds should be made from the permanent school fund. Payment of premium in purchase of county bonds should be made from temporary school fund.
3. ———. In purchasing high rate of interest coupon bonds, the board cannot detach coupons therefrom so that the remaining coupons will net the state 6 per cent from the date of purchase to maturity.
4. ———. After investment in U. S. three per cent bonds, the board cannot sell or convert them into other securities. When paid they may be re-invested as the board deem best.

THIS was a matter coming before the court by the following letter:

"OFFICE OF THE BOARD OF EDUCATIONAL LANDS }
AND FUNDS,
LINCOLN, NEB., Nov. 13, 1883. }

"To the Supreme Court of the State of Nebraska:

"We, the undersigned members of the board of educational lands and funds, would respectfully represent that

In re School Fund.

a doubt exists in regard to the construction of section 9, article 8, of the constitution, and section 29 of an act entitled, "An act to provide for the registry, sale, and general management of school lands and funds," approved February 24th, A.D. 1883, and if not inconsistent with the duties of your honorable court, in order to further the proper execution of the law, we would respectfully solicit an opinion upon the following questions:

First. Can the board of educational lands and funds, under the said section of the constitution and the law, invest the principal of the permanent school fund in U. S. three (3) per cent bonds, either at par or at a premium. If so, can they pay a premium therefor from the temporary school fund, or will the board in paying such premium be compelled to draw from the permanent school fund therefor?

Second. Can such board, in purchasing a high rate of interest registered county bond, detach coupons therefrom so that the remaining coupons will net the state six (6) per cent from the date of purchase to maturity?

Third. Have the board, after purchasing U. S. three (3) per cent bonds for the permanent school fund, the power under the law to sell or convert such bonds into high rate of interest registered county bonds?

Respectfully submitted,

A. G. KENDALL,

Com. Public Lands and Buildings.

E. P. ROGGEN,

Secretary of State.

ISAAC POWERS, JR.,

Attorney General.

JAMES W. DAWES,

Governor.

Members of the Board of Educational Lands and Funds

OPINION OF THE JUDGES.

To the Honorable the Board of Educational Lands and Funds:

GENTLEMEN—Deeming an answer to the questions propounded by you in your communication of the 13th instant respecting the investment of permanent school funds of the state not inconsistent with our duties, we submit the following:

To the *first* question, taking them in the order in which they are put, we answer that you clearly have the authority, under the sections of the constitution and statute to which you refer, to invest those funds in United States three per cent bonds if you deem it advisable to do so. The doubt you mention of your right to invest in these three per cent bonds was prompted, very likely, by the low rate of interest which they bear, together with the *proviso* in section 29 of the act of February 24th, 1883 [Comp. Stat., appendix, 1883, p. 888], relative to investments in "high rate of interest bonds" of counties, which cannot be made so as to net "a lower rate of interest than six per cent per annum." But this restriction extends at most only to the purchase of county bonds, and evidently has no reference whatever to investments in United States and state securities.

As to the payments of premiums, if they be necessary in the purchases of United States bonds, these must be made out of the permanent school fund, for there is no authority for making them out of any other. The only cases in which premiums can be paid out of the temporary school fund are those of investments in "high rate of interest" county bonds, as provided in the above mentioned section. And even these, but for this special provision, would have to be made out of the permanent fund. The payment of

In re School Fund.

a premium in making an investment when the market value of the security purchased justifies and requires it, is a legitimate use of the money as a part of the investment, and does in no sense violate the constitutional provision that this fund "shall remain forever inviolate and undiminished." Investments of this fund in any of the securities permitted by the constitution, whether at their par value, or above or below it, although made in the reasonable hope of an advance in their market value, and a consequent gain, must necessarily be at the hazard of a depreciation and consequent loss. Within the restriction of the constitution which limits these investments to United States and state securities, and registered county bonds, the law leaves them entirely to the judgment of your honorable body.

To the *second* question, we answer, no. While, so far as we now see, a purchase of "high rate of interest" county bonds in the mode suggested by the question might produce substantially the same result as would that designated by the statute, it is different. And where the legislature in precise terms have specified the means by which to reach a desired end, those means should be used. By using the means provided there is absolute safety of action, while in adopting and using any other there is not. The mode of paying the premium required in the purchase of this sort of bonds the statute provides must be from the temporary school fund, and this should be followed.

To the *third* question, we answer, no. The authority given by the statute to the board is simply to direct investments of the money on hand in certain specified securities, not to change investments, when once made, from one security to another. If the legislature had intended that such changes might be made, doubtless the power to make them would have been clearly expressed, and not left to a forced construction of the statute. Where, however, securities in which investments have been made mature, and the money

In re Brown.

is returned to the fund, it is then within the control of the board for reinvestment.

Very respectfully,

GEO. B. LAKE,

Chief Justice.

COBB and MAXWELL, J.J., concur.

IN RE GUY A. BROWN, REPORTER.

Printing Supreme Court Reports. Under the provisions of section 19, laws 1879, p. 82, in connection with section 8, article VI., of the constitution, the reporter of the supreme court is only entitled to draw from the state treasury the cost of printing, stereotyping, and binding each volume of reports not exceeding \$2.25 per volume. Expenses incurred by the reporter in preparing copy, reading proof, and packing and shipping are not properly chargeable against the appropriation made by the legislature for payment of said volumes. The salary paid to the reporter is exclusive of any and all other modes of compensation for work on the reports.

THIS was a matter coming before the court upon the report of Guy A. Brown, reporter of the supreme court, stating in substance as follows:

1. The receipt and disbursement of funds for the supreme court and library:

Jan. 1, 1875, Balance on hand	\$ 16.50
" 1, 1884, Receipts to date	10,178.12
Total	10,194.62
Disbursements 1875 to 1884	10,167.85
Balance on hand.....	26.77

2. Library fund for purchase of books:

Jan. 1, 1875, to Jan. 1, 1884, from sales	\$18,292.44
Paid into state treasury	18,292.44

3. Charging of fees on admission of attorneys to practice in supreme court.

4. Publication of reports of supreme court.

Eleven volumes published and eleven thousand printed. Drawn from the treasury therefor, \$24,484.50. Disbursements, for printing, stereotyping, and binding, \$22,202.85; for employees assisting in preparing MS. for publication, reading proof, and packing and shipping, \$2,281.65.

5. The method and manner of drawing money, disbursing the same, and settling therefor with the state.

In support of his action in disbursement of money for publishing the supreme court reports, the reporter submitted the following opinions in answer to questions submitted, viz.:

I. When the reporter of the supreme court shall have completed a volume of reports not less than 600 pages, and bound the same equal to volume 4, and delivered 1,000 copies with plates to the auditor, and voucher or claim for "1,000 copies of vol. —, \$2,250," has the auditor any discretion, and is it not his duty to draw his warrant upon the treasury in favor of said reporter for the sum specified?

II. Has the auditor any legal right to enter upon any inquiry as to the actual cost of printing and binding and mechanical work involved in the production of said volumes?

III. Are the words "or so much thereof as may be necessary," in the appropriation acts, words of limitation applicable to a statute which like sec. 19 fixes a designated and definite sum payable for a certain service? In such case is it not the law that determines the "amount necessary," and not the individual officer?

IV. Under the law, is not the reporter made the publisher of the reports, and has he not the right to obtain the printing and binding wherever he sees fit, and when completed to draw pay at the rate of \$2.25 per volume?

OPINION OF GEORGE B. LAKE.

. OMAHA, Feb. 16, 1884.

Guy A. Brown, Esq., Lincoln, Neb.:

DEAR SIR—I have examined the four questions propounded by you, and give the following answers: There are two statutes governing the subject of your inquiry, viz., sec. 19, ch. 19, page 200 of the Comp. Statutes, and the general appropriation act of 1883. The first clause of said sec. 19 relates exclusively to the duty of the reporter in the publication of the reports and the character of the mechanical work of the volumes produced. It requires the reporter from time to time as “sufficient material (opinions) is accumulated to form a volume of not less than six hundred pages” (there may be more doubtless in the discretion of the reporter) to “cause the same to be printed, stereotyped, and bound in a good and substantial manner,” and equal in these respects to the fourth volume of the Nebraska Reports, this volume being made the test of mechanical excellence. The next clause of the section requires the reporter upon the completion of a volume to deliver a thousand copies, neither more nor less, together with the stereotyped plates thereof, to the auditor of public accounts, for the use of the state, for the fixed price of “two dollars and twenty-five cents per volume.” This price is fixed by the legislature, and is to be paid to the reporter without regard to what the cost of the work may have been to him, whether more or less than that amount. If he be so fortunate as to produce a book which comes fully up to the standard of excellence given for less than this fixed price, it is that much to his advantage pecuniarily, but if it happen to cost him more, it is his loss. There is nothing in the law which requires the reporter to have the work done by any particular person, nor by the one who will do it for the least compensation. Neither is he obliged to furnish

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or keep an account of his expenditures attending the publication and delivery of the books. The state has no interest in these matters. He must deliver books which at least come up to the statutory standard, but by what particular means he does this, or what it has cost him to do it, is not of the least consequence to the state. Upon the delivery of the required number of the required excellence, the state becomes his debtor at the rate of \$2.25 per volume, which the auditor is required to pay by his warrant on the state treasurer. The only matter upon which the auditor is required to exercise his judgment or has any discretion is simply as to whether the books answer the above mentioned requirements of the statute. With the cost to the reporter he has nothing whatever to do. With the particular expenses incurred in the publication of the reports the state has not seen fit to concern itself. By an act of the legislature, it has simply agreed to become the purchaser of a given number of copies of each volume as they successively appear, provided they reach a given standard of mechanical excellence.

Such being my views of the law (and I do not see how it is possible to take any other), my answer in brief to your first question is, that upon the delivery of 1,000 copies of any volume of Nebraska Reports, together with the stereotyped plates thereof, to the auditor, if he find that they are equal to volume 4 of said reports, it is his duty to draw his warrant upon the state treasury in favor of the reporter for what they come to at \$2.25 per volume, viz., \$2,250.

And second, I answer that the auditor has no right to enter upon an inquiry as to the cost of printing and binding of the books, nor as to any other expense incurred in their production.

To your third question, I answer that the clause, "or so much thereof as may be necessary," found in the appropriation act of 1883, has no possible application to the amount to be paid for each thousand copies of the reports. As I

have before said, section 19, above referred to, fixes the price for the auditor to pay per volume, which price he has no authority either to increase or diminish. He should see to it that the books delivered fairly reach the standard of required excellence, and if they do, he must pay for them. The only possible application these words could have would be upon the contingency of the non-publication of one or more of the volumes, which the legislature seem to have anticipated. The appropriation for this particular purpose seems to have been made with the view that at least three volumes—14, 15, 16—would be published before the next session of the legislature, and a gross sum, viz., \$6,750, to cover the entire cost of one thousand copies of each at the rate of \$2.25 per copy, was named in the act. Now, if but one or two volumes shall be published during the life of this appropriation, which, under section 19, article 3, of the constitution, will extend to the end of the first fiscal quarter after the adjournment of the next regular session of the legislature, then the whole of the appropriation will not be "necessary." But if all three volumes shall be published, and the reporter delivers the required number, together with the plates on which they were printed, and they conform to the requirement of the statute, then the whole amount appropriated will be "necessary" to pay for them.

The fourth question has been fully answered in what I have already said. It is clear that under the law the reporter is made the publisher of the reports, and has the right to have the work done wherever he sees fit. He is to furnish books of a given quality and of a certain number, and when he does so he is entitled to receive a fixed price, viz., \$2.25 per volume, neither more nor less. If the work should be much better even than volume 4, which is made the test, or if it should cost the reporter considerably more than \$2.25 per copy, this price would still be the exact measure of his compensation for what he is required

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to furnish the state. This, I think, fully covers the ground of your inquiry, and is respectfully submitted.

GEO. B. LAKE,
Attorney at Law.

OPINION OF S. H. CALHOUN.

NEBRASKA CITY, Feb. 16, 1884.

Guy A. Brown, Esq.:

DEAR SIR—Your letter of yesterday duly received. Section 19 of chapter 19 is a general law, not one enacted for temporary purposes like an appropriation bill: the one stands until it is repealed or amended, and prescribes a rule of action for each succeeding report as long as it thus stands; the other virtually dies when the term which it provides for has expired. Now, as a law, the first is of a higher grade, and if there is any conflict it must stand. But there is no real conflict. The expression in the appropriation act of 1883, "or so much thereof as may be necessary," does not apply to the auditor; it applies only to the different officers for whose use the several appropriations are made. They are the sole judges of how much of the sums of money thus placed to their credit is necessary to be used. It is not for the auditor to say whether or not a new chair is necessary for the governor's office, or whether it shall cost \$5 or \$10. If the auditor alone may determine the amount of expenses to be allowed in publishing the reports, why may he not say that the whole is unnecessary, and thus stop their publication altogether? The section that I have referred to provides that the auditor, when certain things are done, "shall draw his warrant" for the same at the rate of \$2.25 per volume. There is no repeal of this law, and there is only one way to alter its provisions, and that is by a strict compliance with section II., article III., of the constitution.

Yours respectfully,
S. H. CALHOUN.

OPINION OF THE COURT.

COBB, CH. J.

Guy A. Brown, reporter, having by direction of the court submitted a report of the administration of his office since the creation thereof by the adoption of the present constitution, and upon careful consideration thereof, the court deems it fitting and proper to make observation, and take orders thereon.

The report covers the entire period of time since the first appointment of a reporter in 1875, and applies to the duties of said officer as clerk of the supreme court and librarian of the law and miscellaneous library of the state, as well as to his duties as reporter. It is divided into five parts as follows: 1. The receipts and disbursement of funds for the supreme court and library. 2. The condition and management of the library fund. 3. The charging of fees for the admission of attorneys to practice in the supreme court. 4. The publication of the reports of the supreme court. 5. The method and manner of drawing money, disbursing the same, and settling therefor with the state.

As to the matters arranged under the 1st and 2d heads, no suggestion of mismanagement of any part of these funds has ever reached the ears of any member of the court. The vouchers for their disbursement have been presented to the legislature at each of its biennial sessions, and no doubt examined by the appropriate committees; so that even if the regular duties of the court were not such as to forbid the devotion of sufficient time to the examination of the accounts and vouchers running through the nine years of time in question, we would scarcely feel justified in entering upon the discharge of such duty. But had we not the greatest confidence that such funds have been intelligently expended, and honestly disbursed and accounted for by the

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reporter, no consideration of convenience would prevent the court from making such examination.

As to the matter stated under the 3d head, the statute seems to contemplate the original admission of attorneys in this court, as well as in the district courts, and such has been the practice to some extent. When attorneys are admitted in that way, the clerk must keep a record of the appointment of a committee of examination as well as of the making of its report and its character, also receive, file, and preserve such report, and in all cases he must prepare and preserve the written oath of admission, and prepare and deliver to the licentiate a certificate, more or less expensive, of such admission. For this service the clerk is entitled to some compensation, although no fee is provided therefor in the statutory fee bill. Such omission should have been provided for by rule of court, and the matter having been thus far overlooked, such a rule will be adopted simultaneously herewith, in which it will be sought to fix such fees at a rate which will be reasonable and just.

4. The publication of the reports of the supreme court. Under this head the reporter states that he has drawn from the state treasury the sum of \$24,484.50 for eleven thousand volumes of reports (being volumes four to fourteen, both inclusive), one thousand copies of each volume. That for the mechanical work performed on these volumes, including the printing, binding, and stereotyping, he has paid \$22,202.85, and the balance, amounting to \$2,281.65, to persons employed to assist him in preparing the manuscript for publication, reading proof, etc., and the expenses connected with packing and shipping the books after their delivery to the library, for which no appropriation was otherwise made prior to the year 1883. The reporter proceeds to say that in the drawing of the appropriations he has simply asked for and received the price in payment for each 1,000 copies delivered. That he has considered that section 19 made the reporter the publisher of the reports,

for which he is entitled to receive \$2.25 per volume, just as the former reporter received \$4.50 per volume, and for the correctness of this opinion, reference is made to the written arguments of two eminent counselors accompanying said report.

The provision of statute under which these volumes of the reports were published is as follows:

"Sec. 19.. It shall be the duty of the reporter of the supreme court to prepare the opinions of said court for publication as fast as they are delivered to him, and when sufficient material is accumulated to form a volume of not less than six hundred pages, he shall cause the same to be printed, stereotyped, and bound in a good and substantial manner, equal to volume four of said reports. He shall deliver one thousand copies of each volume, with the stereotype plates thereof, to the state auditor, who shall draw his warrant in payment thereof at the rate of two dollars and twenty-five cents per volume." Comp. Stat., chap. 19.

Looking alone to the letter of this provision, it is probably susceptible of the construction placed upon it by the reporter, and when we consider that he is sustained in such view by gentlemen of eminent legal ability, and of long connection with the judicial and legislative history of the state, we cannot doubt his honesty and good faith in placing such construction upon the law and his action thereunder. And yet we are quite unable to adopt that construction.

The constitution, section 8, article VI., provides as follows:

"Sec. 8. There shall be appointed by the supreme court a reporter, who shall also act as clerk of the supreme court and librarian of the law and miscellaneous library of the state, whose term of office shall be four years, unless sooner removed by the court; whose salary shall be fixed by law, not to exceed fifteen hundred dollars per annum."

The nature and character of the reporter's duties as such

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are sufficiently indicated by the name of his office, and their extent is clearly set out by the provisions of the statute above quoted. These duties clearly embrace the preparing the opinions for publication, writing all that part of each case sometimes called the report as distinguished from the syllabus and the opinion, as well as the title page, table of cases and citations, index, and such notes and other special matter as may be deemed necessary and proper by the reporter or the court, superintending the printing, reading, and correcting the proof, etc., and to these duties the law adds that of causing the reports to be "printed, stereotyped, and bound," and to deliver a thousand copies of each bound book to the state auditor. For this service the constitution provides that the reporter shall receive an annual salary. That, in the opinion of the court, is exclusive of any and all other modes of compensation.

While the statute does not make it the duty of the reporter to let the printing, stereotyping, and binding of the reports to the lowest bidder, yet it is the spirit of the law that he should protect the interest of the public in the matter committed to his charge by procuring good and honest work at the lowest rates reasonably available. The rate fixed by the statute of \$2.25 per volume must be regarded only as the limit of cost, beyond which the reporter is not allowed to go in the publication of the reports. But if the object is accomplished at a less outlay, then that advantage must inure to the state, and not to the private advantage of any individual or officer. In the matter of the publication of the reports, the reporter is and must be regarded as a disbursing officer of the state, and not as a contractor.

From these views it necessarily follows that the sum of \$2,281.65 has been erroneously drawn from the treasury by the reporter on account of printing, stereotyping, and binding the reports hereinbefore enumerated, and is now in his hands, and while the law has given this court no

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direct control over the matter, yet, the reporter being an officer of the court as well as of the state, the following orders are made:

1. Directing the payment of said sum of \$2,281.65, with interest from dates the same was respectively drawn, into the state treasury, taking the receipt of treasurer therefor, and exhibiting same to court at next session thereof.

2. Directing that the report, with arguments of counsel attached thereto, and these observations and orders thereon, be spread on the records of the court.

3. Establishing a rule concerning admission fee of attorneys. In case of original admission, upon the report of the committee, 75 cents; admission on motion, 50 cents. Where attorney may desire a certificate, an additional fee of \$1.00.

REESE, J., concurs in foregoing.

I concur in requiring the repayment of the money.

SAMUEL MAXWELL.

Dated March 22, 1884.

IN COURT, May 29, 1884.

The said Guy A. Brown having exhibited to the court the receipt of the state treasurer, dated March 22, 1884, for the sum of \$2,802.40, it is ordered that the same be spread on the minutes of the court in full satisfaction of the order of court heretofore entered.

AMASA COBB, *Ch. J.*

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